Supreme Court, U.S.
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No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DIONNE STAPLES,

Petitioner,

v.

MICHAEL P. KELLY, JOHN T. KELLY, and the SECRETARY, UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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April 24, 1997

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a circuit court of appeals reviewing the decision of an administrative law judge in a discrimination case arising under the Fair Housing Amendments Act has authority to reduce the amount of the damage award to the victim of housing discrimination based solely upon agency delay.

2. Whether a circuit court of appeals reviewing the decision of an administrative law judge in a discrimination case arising under the Fair Housing Amendments Act has authority to award an amount less than the amount of actual damages proven by the discrimination victim.

3. Whether a circuit court of appeals reviewing the decision of an administrative law judge under the Fair Housing Amendments Act has authority to reverse an award of post-judgment interest found by the ALJ to be appropriate.

PARTIES TO THE PROCEEDING

Petitioner is Dionne Staples, an individual who intervened in an administrative action brought by the Secretary of the United States Department of Housing and Urban Development.

Respondents are Michael P. and John T. Kelly, who are individuals.

The Secretary of Housing and Urban Development is identified as a Respondent, but is not believed to have interests adverse to those of Petitioner. HUD has, until this juncture, prosecuted this action on behalf of Ms. Staples but has elected not to seek certiorari.

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Respondents.

PETITION FOR WRIT OF CERTIORARI

Dionne Staples respectfully asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, review of which is sought, is reported at 97 F.3d 118 (6th Cir. 1996), and is reproduced in the Appendix attached to this Petition at App. A. A prior decision of the Court of Appeals for the Sixth Circuit, 3 F.3d 951 (6th Cir. 1993) is reproduced at App. B. The Initial Decision and Initial Decision of Remand

of the Department of Housing and Urban Development, Office of Administrative Law Judges, are unreported and are reproduced at Apps. C and D, respectively.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 1996. Timely petitions for rehearing and rehearing *en banc* filed by Petitioner and by the Secretary of Housing and Urban Development (App. G) were denied on January 24, 1997. App. E.

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes involved lie within the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601—19, and especially 42 U.S.C. § 3604. Pertinent provisions, including 42 U.S.C. §§ 3604, 3610, and 3612, are reproduced at App. F.

STATEMENT OF THE CASE

A. Overview and Summary

This case, arising under the Fair Housing Amendments Act of 1988, presents a direct conflict among the circuits, and between the Sixth Circuit and this Court, with respect to the measure of damages in cases where discrimination and actual damages are proven.

Dionne Staples, a victim of housing discrimination based

upon the size of her family, entrusted her discrimination claim to HUD instead of bringing her own civil action. She intervened as a party, and, in a three-day trial before an administrative law judge, proved more than $10,000 in compensatory damages. The ALJ awarded her all the damages he found her to have proven. The court of appeals ultimately reduced those damages by more than half, limiting her damage period to one year because it believed the agency investigation should have taken only that long. Had she brought her own case in court instead of participating in the administrative-remedy program created by Congress to *benefit* discrimination victims, she would have been entitled to all the damages she proved. The court of appeals thus created a rule of damages for administrative discrimination cases entirely different from that applicable to court cases, both unfairly punishing discrimination victims for bureaucratic slowness and judicially legislating a two-tiered system for resolution of discrimination claims.

B. Facts

On March 5, 1990, Dionne Staples was denied an apartment by Michael Kelly because, she was told, she had "too many children." App. C37. She immediately filed a complaint with a local fair housing agency, which investigated her claim of discrimination by using testers. That testing confirmed that the Kellys had a practice of refusing to rent two-bedroom apartments to families with two children, and also demon-

strated that different rental amounts were quoted to white and black testers.

Based upon the testing, and on May 17, 1990, the fair housing agency forwarded Ms. Staples's complaint to HUD for investigation.

C. Initial Agency Proceedings

Under 42 U.S.C. § 3610(a)(1)(C), HUD had 100 days to investigate Ms. Staples's case, unless doing it in that time period proved "impracticable." *Id.* HUD did not meet this goal; rather, it issued its Charge of Discrimination on March 2, 1992, more than 21 months after Ms. Staples's complaint was filed. It did, however, notify Michael Kelly and his realty company that the investigation would take longer than 120 days. App. H145-46.

After the Charge of Discrimination was issued, the agency's administrative law judge ("ALJ") moved with alacrity. He tried the case over a three-day period in May 1992 pursuant to the provisions of the Fair Housing Act of 1968, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3601 *et seq.*

On August 26, 1992, the ALJ found that Ms. Staples had been discriminated against on the basis of her familial status, in violation of the Amendments, 42 U.S.C. § 3604. App. C34 *et seq.* (holding); App. F111 (statute). He awarded her actual damages totaling $6,930.76 for the period between the dates of

discrimination and trial[1] (App. C61). He also awarded her $3,500 in intangible damages to compensate her emotional distress and loss of housing opportunity. App. C74.

The ALJ declined to award what would otherwise have been a "civil penalty of approximately $3,000 because of HUD's processing delays." App. C76-78; App. D98. He took this action based upon the Sixth Circuit's 1992 decision in *Baumgardner v. HUD*, 960 F.2d 572 (6th Cir. 1992), in which the court set aside a civil penalty where HUD's investigation of gender-based housing discrimination took longer than the court of appeals thought proper. App. C77.

D. The First Appeal

The Kellys petitioned the Sixth Circuit for administrative review pursuant to 42 U.S.C. § 3612(i). App. F116. The panel which heard that appeal affirmed the finding of discrimination, but remanded for further conciliation efforts and, if necessary, recalculation of damages. While recognizing that "the principal purpose of both the original and amended Acts is to

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[1] The ALJ broke down his award as follows:

Alternative housing cost differential	$1,250.00
Additional commuting expenses ..	1,680.00
Miscellaneous mileage	120.00
Additional commuting time	3,402.81
Expenses in connection with claim ..	477.95
TOTAL	$6,930.76

vindicate the rights of persons who suffer discrimination in housing" and asserting that it "d[id] not want to penalize the complainant for HUD's errors" (App. B32), the panel decreed that "in no case should damages be assessed for the period during which HUD completely neglected this case." *Kelly v. Secretary, HUD*, 3 F.3d 951, 958 (6th Cir. 1993) (App. B33). The Secretary moved for rehearing by the panel; his motion was denied.

E. Agency Proceedings on Remand

On remand, the parties engaged in protracted conciliation discussions. That effort did not succeed.

Thereafter, the ALJ ordered the parties to submit briefs addressing a number of questions relating to the court of appeals decision. The Secretary submitted extensive sworn declarations documenting the procedures used in investigating and evaluating Ms. Staples's complaint; these are reproduced at App. H137-60.[2]

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[2] The HUD declarations reveal an investigative and administrative process which would make any bureaucratic heart beat faster. However, it is plain that while the HUD review process consisted of a bewildering complex of reviews, recommendations, and referrals, this case received better-than-average attention at all levels. For example, the case spent 123 days in the investigation phase; the average was 141.5 days (App. H140). The staff attorney assigned to the case handled his files in an average of fourteen months; he processed this

After review of the evidence, the ALJ concluded that he could identify no period "during which HUD completely neglected this case." App. D98. The Kellys also were unable to document any period "during which HUD completely neglected this case," choosing instead to assert that the case was neglected from the day it was filed. In an effort to comply with the Sixth Circuit's decision, however, he reduced the

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one in ten. App. H7. As the Secretary's rehearing brief says (App. G7):

> Staples' complaint, which involved familial status discrimination, was slightly more than one year after the new amendments became effective. The case received careful review in both the Regional Office and in the Washington office. That review process, which has since been streamlined within HUD, consumed a substantial amount of the elapsed time in this case. Each of the HUD employees to whom the case was assigned for conciliation, investigation, recommendation or review completed his or her function as quickly as possible given his or her increased workload and the novelty of the issues involved. See Charging Party's Memorandum Pursuant To The Administrative Law Judge's August 16, 1994 Order—Knox Declar. ¶¶ 1-10 [App. H143-45]; Jung Declar. ¶¶ 3, 7-8 [App. H137-40]; Nixon Declar. ¶¶ 3-4, 7, 13 [App. H152-55]; Rayford Declar. ¶¶ 3-6 [App. H148-51].

damages award by $1.

The ALJ ordered the Kellys to pay post-judgment interest on the award to Ms. Staples from the date of his initial decision, *i.e.*, September 25, 1992, at the annual rate of 3.13%. App. D106.

F. The Second Opinion of the Court of Appeals

The Kellys again petitioned for review. Ms. Staples also petitioned for review, arguing that the ALJ had acted in a fashion contrary to law by reducing her damages at all.[3] These petitions resulted in the September 30, 1996 panel decision giving rise to this Petition (App. A1-16). A majority of the hearing panel did not dispute the ALJ's factual determination that there was no period of "complete neglect" by HUD. Nonetheless, the majority held that Ms. Staples's damages were to be limited to a 12-month accrual period—a reduction of more than 50%. The basis for this holding was that where HUD exceeds statutory time limits for the processing of a complaint, "the reasonable accrual period for damages . . . is twelve months: the period within which Congress intended HUD to carry out its administrative responsibilities and the

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[3] These two petitions were Nos. 95-3008 and 95-3107, respectively. The third case number set out in the Court of Appeals decision (App. A1), No. 94-4141, was the Kellys' petition for review of the ALJ's award of interim attorney fees to Ms. Staples.

standard term of a rental lease." App. A6.[4] The panel reduced Ms. Staples's award of actual damages from the $6,930.76 she proved at trial to $3,571.03. *Id.*

The panel also reduced the sum awarded by the ALJ for emotional injury and loss of housing opportunity by more than 70%, from $3,500 to $1,000. The panel asserted that any remaining emotional harm to Ms. Staples was "caused by HUD." App. A7. The court did not acknowledge the ALJ's determination that Ms. Staples's award "for emotional distress and lost housing opportunity ($3,500) . . . [was] not based on an accrual period." App. D. 89 n.1.

Exercising its "equitable jurisdiction," the court of appeals ordered the Secretary to pay $20,000 to the Kellys for their attorney's fees.[5]

Finally, the court reversed the ALJ's award of interest to Ms. Staples, "[b]ecause damages have not been 'meaningfully ascertained' until now." App. A10.

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[4] The panel majority commented that the damage period was unreasonable in part because HUD took "twenty-five months to issue its Charge of Discrimination without so much as an explanation to the parties." However, HUD did in fact mail letters to all parties except John Kelly, notifying them that the investigation would not be completed within 100 days. App. H144-45.

[5] It is Petitioner's understanding that this, alone among the various judgments in this case, has been paid.

In dissent, Judge James Ryan expressed "strong disagreement" with the reduction of Ms. Staples's damages, which he believed to be based upon the "majority [being] angry at HUD." App. A10. He wrote that it is "unjust in the extreme to penalize the victim, Staples, and reward the discriminators, the Kellys, because the majority is impatient with HUD." App. A11. As to the limiting of damages to a 12-month period, Judge Ryan wrote: "[t]here is absolutely nothing in the record to support 'twelve months' as the appropriate period for the damage award and, to its credit, the majority does not claim there is any record support for what it has done." App. A10-11.

In closing, Judge Ryan called the majority's decision "an unedifying exercise in unrestraned judicial power." App. A16.

G. Rehearing

Both the Secretary, represented by the Justice Department, and Petitioner sought rehearing and suggested rehearing *en banc*. The Secretary, whose rehearing petition is reproduced at Appendix G, asserted that the panel decision was in direct conflict with this Court's decisions, prior decisions of the Sixth Circuit, and the intent of Congress. App. G119. The Secretary also said:

> The panel's decision also raises the specter of a two-tiered system of justice that works to the detriment of complainants who need to rely on the federal administrative process because they cannot afford to bring an action in court. For discrimination suffered on the same date, a victim who brings a case to HUD

> that requires more than one year to process may be limited to one year of damages under the reasoning of the panel decision (at least if HUD does not timely issue a 100-day letter) but a victim with the resources to go to court suffers no similar penalty even if her case is heard at the same time. This dissimilar treatment of discrimination victims is in tension with due process and equal protection principles. Cf. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438-442 (1982).

App. G135 n.10.[6]

Rehearing and rehearing *en banc* denied on January 24, 1997 (App. E109-10), Judge Ryan again dissenting.

REASONS FOR GRANTING THE WRIT

Certiorari is appropriate in this case under Sup. Ct. Rule 10.1(a). The Sixth Circuit's decision is in conflict with that of other courts on the issue of the damages available to a

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[6] Petitioner has been advised that the Secretary will not seek certiorari in this matter, and may in fact oppose Ms. Staples's petition for certiorari. This decision on the part of the Secretary highlights the tension which exists when Congress requires public agencies and their counsel to represent private interests: What is an important issue to a victim of discrimination is not always an important issue to a Government agency. Petitioner respectfully urges this Court to closely consider the differences between the interests of the Secretary (who was, rightly or wrongly, found to have neglected his responsibilities under the law and ordered to pay $20,000 toward the Kellys' attorney's fees (App. A8-9)), and Petitioner, who is entirely blameless.

discrimination victim. The court also "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

Certiorari is also appropriate under Rule 10.1(c). The Sixth Circuit has decided a federal question in a way that conflicts with applicable decisions of this Court.

The decision in this case establishes a measure of damages in cases before HUD administrative law judges in the Sixth Circuit which, if not set aside, will adversely affect victims of housing discrimination whenever HUD has exposed itself to judicial criticism. It will also steer claimants with means away from the administrative process and into the district courts, where they are insulated from the impact of the decision below. Unless this Court acts, the balance struck by Congress will remain badly skewed in the Sixth Circuit.

A. The Court of Appeals Decided A Federal Question In A Way That Conflicts With Applicable Decisions Of This Court.

The panel majority established the rule that when HUD does not investigate an administrative complaint of housing discrimination within the statutory time frame, damages are cut off after 12 months. This conflicts with two distinct lines of authority from this Court—cases establishing the scope of appellate review of administrative agency action, and cases establishing the measure of damages in fair housing cases. Certiorari therefore is appropriate under Sup. Ct. Rule 10.1(c).

1. *NLRB v. Rutter-Rex.*

In *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969), the Court held that a court of appeals lacks the authority to require an administrative tribunal to shift the consequences of agency delay away from the violator of federal law and onto the victim by reducing the award because of the Board's delay in calculating the amount due. In reversing an appellate decision to arbitrarily cut off the period of back-pay accrual where the NLRB engaged in "deplorable" delay, the Court said:

> Either the company or the employees had to bear the cost of the Board's delay. The Board placed that cost upon the company, which had wrongfully failed to reinstate the employees. In an effort to discipline the Board for its delay, the court shifted part of that cost from the wrongdoing company to the innocent employees.

396 U.S. at 263-64. This prose closely resembles that of Judge Ryan in this case: "It is unjust in the extreme to penalize the victim, Staples, and reward the discriminators, the Kellys, because the majority is impatient with HUD." App. A13-14.

Rutter-Rex was reaffirmed by the Court in *NLRB v. Ironworkers*, 466 U.S. 720, 724-25 (1984) (court may not enter an order that "punishes employees for the Board's nonfeasance"). It also has, since the Court decided it, consistently been viewed as standing for the principle that agency delay will not prejudice the rights of individuals who entrust their individual-rights claims to Government agencies for handling. The lower

courts have unhesitatingly applied it in cases of agency delay arising under Title VII of the Civil Rights Act of 1964. In *Kraszewski v. State Farm Gen'l Ins. Co.*, 912 F.2d 1182, 1186 (9th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991), the court held that *Rutter-Rex* is as applicable to Title VII as it is to the NLRA because Title VII's remedial provisions were based on, and have purposes similar to, those of the NLRA. *Accord, United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 932-33 (10th Cir. 1979) (district court cannot reduce backpay award so as to put portion of cost of lengthy court process on victims of discrimination, rather than on employers). *Rutter-Rex* has been found controlling in cases brought under the Age Discrimination in Employment Act. *Marshall v. Sun Oil Co. (Delaware)*, 605 F.2d 1331, 1339 (5th Cir. 1979). And at least one district court has found *Rutter-Rex* applicable to a case arising under the Fair Housing Act Amendments. *United States v. Barberis*, 887 F. Supp. 110, 116 (D. Md. 1995).

The principle of *Rutter-Rex*—a decision of this Court which, in this case, the Sixth Circuit elected not to mention, much less to distinguish—is more than a question of allocating harm caused by governmental delay. Rather, the case makes a fundamental point of administrative law: That when an administrative agency makes adjudicative decisions regarding matters within its congressionally-defined area of responsibility, the courts of appeal must, absent agency action which is contrary to law, enforce those decisions. There is uniform

agreement that ALJ decisions in fair housing cases must be reviewed under standard deferential-review standards applied under the Administrative Procedure Act. *E.g.*, *Morgan v. HUD*, 985 F.2d 1451, 1457 (10th Cir. 1993); *HUD v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990).

Rather than acknowledge this principle, and its importance to orderly administrative-law jurisprudence, the court of appeals in this case elected to chart a course dictated by what Judge Ryan characterized as the "impatien[ce]" of the majority with the administrative agency. In so doing, the court of appeals acted in essence as both jury and legislature. It ignored the ALJ's factual analysis, finding the facts as it saw fit. It then created a new rule of law—that administrative adjudications under the Fair Housing Act Amendments must be evaluated differently in the states of the Sixth Circuit than those of the other circuits, and victims of housing discrimination, in order to fully protect their rights, must choose to sue in court (if they can afford counsel) rather than proceed administratively. This was hardly what Congress intended when the Amendments were passed.

There is no way to reconcile *Rutter-Rex* and the decision of the court of appeals. As Judge Ryan said in dissent, the court's decision was, indeed, an "unedifying exercise in unrestrained judicial power." App. A20. This Court should not permit the court of appeals to bind the Secretary's administrative-enforcement scheme with such an unfair rule of law.

2. *Curtis v. Loether.*

In *Curtis v. Loether*, 415 U.S. 189 (1974), the Court held that damage awards under the Fair Housing Act are legal remedies governed by tort principles: "if a [Fair Housing Act] plaintiff proves unlawful discrimination and actual damages, [s]he is entitled to judgment for that amount." *Id.* at 197.

The Sixth Circuit had, prior to this case, interpreted *Curtis* as holding that "recovery of damages is mandated" when unlawful discrimination has been established. *Jordan v. Dellway Villa of Tenn., Ltd.*, 661 F.2d 588, 594 (1981), *cert. denied*, 455 U.S. 1008 (1982). The Court quoted with approval the argument made by the class of plaintiffs in *Jordan*, who allegedly were denied housing because of race, that "damage awards must reflect what actually occurred, they must measure the plaintiffs' [actual] losses * * *." *Id.*

It has long been recognized that the purpose of an award of compensatory damages under the Fair Housing Act "is to put the plaintiff in the same position, so far as money can do it, as [s]he would have been had there been no injury or breach of duty, that is, to compensate [her] for the injury actually sustained." *Lee v. Southern Home Sites Corp.*, 429 F.2d 290, 293 (5th Cir. 1970). The purpose of a civil rights damage award is "to compensate persons for injuries that are caused by the deprivation of [their] constitutional rights[.]" *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986). The 11th Circuit held earlier this year that "[t]hese 'actual

damages' are compensation for the victim's injuries, not punishment for the perpetrator's wrongdoing." *Banai v. Secretary, HUD*, 102 F.3d 1203, 1207 N.4 (11th Cir. 1997).

Consistent with *Curtis*, the Sixth Circuit has long held that a civil rights compensatory-damage award must "make the claimant whole, that is, to place him in the position he would have been in but for discrimination." *Racimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984). And in *Stewart v. Furton*, 774 F.2d 706, 710 (6th Cir. 1985), the court held that "a plaintiff who 'proves unlawful discrimination and actual damages . . . is entitled to judgment for that amount'" (*quoting Curtis*).

That court has now established an entirely different legal standard for damage in administrative decisions under the Fair Housing Amendments Act—that in cases of agency delay, damages may accrue for only 12 months. Both to avoid gross injustice to Ms. Staples and to ensure that administrative law judges in the Sixth Circuit are able to decide their cases consistent with this Court's decisions, certiorari should be granted and this holding reversed.

B. The Decision Below Conflicts With Decisions in Other Circuits

Other courts of appeal are in direct conflict with the holding, in this case, that appellate courts have the discretion to reduce damages proven at trial by a victim of housing

discrimination because of dilatory agency action. Most recently, in *United States v. City of Hayward*, 36 F.3d 832, 839-40 (9th Cir. 1994), the court held that when it enacted the Fair Housing Amendments Act, "Congress did not intend the courts to have discretion [not] to award compensatory damages if a party has proven actual damages."

In the context of *Hayward* and the substantial volume of case law holding that discrimination damage awards must be fully compensatory, the suggestion by the court of appeals that the ALJ exposed the Kellys to "double damages" (App. A9) is plainly contrary to holdings of other courts. However, the court's decision cannot be dismissed as mere aberration; it establishes rules of law for administrative law judges in four states.[7]

C. The Decision Below Directly Conflicts With The Intent of Congress

The administrative-hearing scheme pursuant to which Ms. Staples's complaint was handled was added to the Nation's fair-housing laws as part of the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619, *codified at* 42 U.S.C. § 3601 *et seq*. Passage of the Amendments, called "the most comprehensive civil rights legislation the Congress has

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[7] The ALJ in this case made clear that he views his decisions within the Sixth Circuit to be bound by Sixth Circuit case law. App. C78 (declining to impose a civil penalty based upon Sixth Circuit precedent).

considered in 20 years" (134 Cong. Rec. at 19,713 (1988) (remarks of Sen. Kennedy)) was described by Senator Arlen Specter as an "historic event." 134 Cong. Rec. at 19,882 (statement of Sen. Specter). Prior to passage of the Amendments, victims of housing discrimination were required to go to court to vindicate their rights. This scheme had proven to be, in the words of the Senate sponsor of the Amendments, a "toothless tiger" because it "recognizes a fundamental right" but "fails to provide a meaningful remedy." *Id.* at 19,711 (statement of Sen. Kennedy). This was so because, in the words of Senator Specter, "[t]he reality today . . . is that the aggrieved parties, who are invariably poor and unable to support [the] cost of litigation, simply have no remedy" for discrimination. *Id.* at 19,882 (statement of Sen. Specter).

Congress's purpose in enacting this administrative enforcement proceeding was to "strengthen the 1968 Fair Housing Act by putting teeth into the enforcement process, and providing for *faster, more practical remedies for victims* of illegal housing discrimination." *Id.* at 19,900 (statement of Sen. Leahy) (emphasis supplied). The House Report noted that the Amendments were needed because "[t]wenty years after the passage of the Fair Housing Act, discrimination and segregation in housing continue to be pervasive." H.R. Rep. No. 711, 100th Cong., 2d Sess. 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2176 (1988). The House Report echoes Senators Leahy and Specter, noting that existing law "fails to provide an effective enforcement system to make [the] promise [of the Fair

Housing Act of 1968] a reality," and that the Amendments "fill that void by creating an administrative enforcement remedy." *Id.* at 13. The point of the Amendments was to provide a "real remedy" for "those victimized by discrimination." 134 Cong. Rec. at 14,659 (statement of Rep. Fish).

Congress made its intention of benefitting *victims* of discrimination clear in other sections of the Amendments. It extended the period in which a complaint could be registered with HUD from 180 days to one year (42 U.S.C. § 3610(a)-(1)(A)); enacted a two-year limitations period on civil actions initiated by victims (42 U.S.C. § 3613(a)); and provided that the two-year limitations period was tolled during the entire period of investigation by HUD (*id.*). Ironically, the longer limitations period was included because the prior six-month provision "had the effect of artificially cutting off a plaintiff's rights." 134 Cong. Rec. at 15,660 (comments of Rep. Fish).

Given the two-year limitations period and the tolling provision established by the Amendments, Ms. Staples could have waited for well over two years after she was illegally denied housing and initiated a civil action in United States District Court. It is beyond dispute that in such a case, she would have been entitled, under *Curtis v. Loether*, to receive all her damages. The panel's decision penalizes her dramatically and substantially for choosing the remedy which Congress intended to "strengthen the 1968 Fair Housing Act by putting teeth into the enforcement process, and providing for faster, more practical remedies for victims of illegal housing

discrimination." 134 Cong. Rec. at 19,900 (statement of Sen. Leahy).

In *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975), this Court said that judicial decision-making regarding damage awards in civil rights cases must be "guided by sound legal principles;" and that where an Act of Congress bestows the judicial power to award damages "as part of a complex legislative design directed at a historic evil of national proportions," a court's authority must be exercised "'in light of the large objectives of the Act[.]'" *Id.* at 416, *quoting Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944). The "courts of appeals must maintain a consistent and principled application" of damage provisions. *Id.* at 421-22.

The decision of the Sixth Circuit in this case falls well short of this Court's demand that damage jurisprudence be consistent with congressional intent, and based upon principled reasoning. When it enacted the 1988 Amendments, Congress intended to benefit victims of discrimination. In this case, the court of appeals merely compounded Ms. Staples's victimization by making her suffer for perceived inadequacies on the part of a federal agency over which she has no control whatever.

D. The Court of Appeals Has Departed From The Accepted And Usual Course of Judicial Proceedings So As To Call For Exercise Of This Court's Power Of Supervision.

The decisions below demonstrate substantial animosity toward HUD. Whether or not the court's vitriol is appropriate as against HUD is of little concern to Petitioner.[8] What is of immediate concern, however, is that the court turned its frustration with HUD toward Ms. Staples. In this regard, and as Judge Ryan said, "there is much in the majority opinion with which to disagree[.]" App. A10. For example, the decision by the court of appeals to deny Ms. Staples the modest benefit of 3.13% interest is so obviously far from the goal of making her whole as to defy logic. The proposition (without the slightest

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[8] This said, the panel majority's characterization of HUD as an "agency run amok" (App. A4-5) is not justified by the record in this case. HUD, which this Court well knows has never been a bastion of efficiency, was faced with substantially expanded responsibilities and an enormous increase in case load. It took longer than it should have to investigate this complaint, and many other complaints. Were this the definition of "run amok," few local, state, or federal agencies would escape the wrath of the Sixth Circuit. In this context, it is at best ironic that this case was before the court of appeals for 10 months the first time it was appealed, and for 21 months—from January 3, 1995 until September 30, 1996 (not including rehearing) the second. The fact is, investigation, evaluation, and adjudication all take time; the agency's delays in this case hardly justified the outrage displayed by the court of appeals.

record support) that the "standard term of a rental lease" (App. A5) is a factor properly considered by an appellate tribunal in evaluating whether an ALJ's decision was based on substantial evidence is equally unreasonable. The court's gratuitous suggestion that Ms. Staples "narrowly and just barely" (App. A8) prevailed on liability belies the strength of the record. The 70% reduction of Ms. Staples's award for emotional distress on the basis of the remarkable suggestion that it was "caused by HUD" (and despite the ALJ's explicit holding that the emotional-distress award was not based upon an accrual period, App. D89 n.1) is deeply disturbing.

It is not for Petitioner to say whether the court's anger and frustration with HUD was appropriate. When that anger and frustration spills over and, without force of logic, deprives victims of discrimination that to which they are plainly entitled, exercise of this Court's supervisory power is indeed called for. Judge Ryan got it exactly right: What happened in this case is an "unedifying exercise in unrestrained judicial power." App. A16.

E. Resolution of These Conflicts Is Of The Highest Importance In Carrying Out The Legislative Purposes Of The Fair Housing Act Amendments

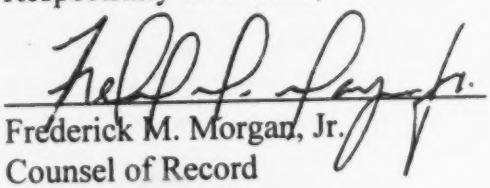
Judge Ryan was obviously correct in calling the majority's decision to reduce Ms. Staples's damages because HUD acted slowly "unjust in the extreme[.]" App. A11. It was also

contrary to law. Victims of housing discrimination in the Sixth Circuit are now subject to a different standard of damages if they elect to permit the Government to represent their interests. The Sixth Circuit reached this result in derogation of decisions of this Court, the intent of Congress, years of interpretation of administrative and fair housing law, and simple justice. This Court should not permit future victims of housing discrimination to face having their claim dramatically devalued because of judicial frustration with HUD.

CONCLUSION

For the reasons set forth above, the Court's standards for granting certiorari, as set out in Sup. Ct. Rule 10.1, are well met in this case. The petition should be granted.

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION

Sixth Circuit Case No. 95-3008/3107/4141

Filed September 30, 1996
Rehearing and Suggestion for
Rehearing *En Banc* Denied January 24, 1997

A1 thru A16

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 95-3008/3107/4141

Michael P. Kelly and John T. Kelly (95-3008/4141),
Petitioners,

Dionne Staples (95-3107),
Petitioner,

v.

Secretary, United States Department of Housing
and Urban Development, on behalf of Dionne Staples,
Respondent.

Argued April 18, 1996
Decided and Filed September 30, 1996
Rehearing and Suggestion for Rehearing En Banc Denied
Jan. 24, 1997[1]

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[1] Judge Ryan would grant rehearing for the reasons stated in his dissent.

Before: Merritt, Chief Judge; Lively and Ryan, Circuit Judges.

Merritt, C. J., Delivered the Opinion of the Court, in Which Lively, J., Joined. Ryan, J. (pp. [12]-[20]), delivered a separate dissenting opinion.

Merritt, Chief Judge. This case is on appeal for the second time from an order of the Department of Housing and Urban Development ("HUD" or "the agency") finding liability and ordering damages against apartment owners Michael and John Kelly for housing discrimination. In this decision we carry out the earlier decision of this court that HUD's neglect and mishandling of the case seriously impaired the ability of the parties to settle the claim and substantially increased the damages sought by Ms. Staples. *See Kelly v. HUD*, 3 F.3d 951 (6th Cir. 1993) (*Kelly* I). Since the Administrative Law Judge (ALJ) did not reduce the damages as instructed on remand beyond a nominal $1.00 amount, we REVERSE that decision and award damages as described below. On the matter of attorney's fees, we AFFIRM the ALJ's grant of fees and costs to Ms. Staples but REVERSE the denial of fees to the Kellys and order that $20,000 of their fees and costs be paid by HUD.

Facts and Procedural History

The facts of this case are described extensively in *Kelly* I, 3 F.3d at 952-953, and we summarize them only briefly here. The Kellys own apartments in Cincinnati, Ohio. While looking for an apartment, Dionne Staples, a single mother ~~of~~ twin five-

year old daughters, called the telephone number on a "For Rent" sign outside an apartment owned by the Kellys. After describing her family situation, Ms. Staples was informed that the Kellys only allowed "one child per bedroom" which implied that the two bedroom apartment she had asked about would not be available to her. Ms. Staples hung up the telephone and immediately called H.O.M.E., Inc., a non-profit fair housing organization in Cincinnati. She made no further attempt to rent an apartment from the Kellys. After a month and a half, she rented another apartment, which was not as convenient, increasing her commute to work and creating other transportation and child care problems. She filed her complaint with HUD alleging housing discrimination in violation of 42 U.S.C. § 3604 on May 17, 1990.[2]

HUD appointed Charles Jung to investigate the claim and also to act as conciliator between the parties. Jung completed his investigation on October 2, 1990, after which time he made no further contact with the Kellys. HUD did not issue its Charge of Discrimination until March 2, 1992, two years after the incident took place.

After a hearing in May 1992, the ALJ found the Kellys

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[2] The complaint alleged discrimination on the basis of race and familial status. After the investigator found no evidence for the race discrimination claim, the complaint was amended to include only the familial status claim.

liable under 42 U.S.C. § 3604 and awarded $10,430.76 in damages. Of that amount, over $6,000 accounted for actual economic damages and $3,500 was ordered to compensate for emotional distress. The ALJ cited HUD's unexplained delay in completing its investigation and noted that the damage award would have been substantially lower had the case been processed in a timely manner. J.A. at 177. Specifically, the ALJ noted that Ms. Staples' out-of-pocket damages "are nearly double what they would have been if the case had been tried within the period contemplated by the Congress." J.A. at 174.

On appeal in *Kelly* I, the Sixth Circuit upheld the ALJ's liability finding, but vacated the damage award and remanded the case for further attempts at conciliation. *Kelly* I, 3 F.3d at 958. Failing that, the court ordered the ALJ to reconsider his damage award in light of the opinion, "but in no case should damages be assessed for the period during which HUD completely neglected this case." *Id.* On remand, the ALJ stated that he could find no period of "complete neglect" and reduced the damages by only a nominal $1.00. The ALJ subsequently ordered an award of attorney's fees and costs to Ms. Staples and denied an award of fees to the Kellys.

Discussion

1. *Damages*

In this appeal, we undertake the task set by the Sixth Circuit in *Kelly* I, but not met by the ALJ on remand, of ascertaining the proper damage award for Ms. Staples in light of the agency's misconduct in this case. This is a case of an

administrative agency run amok. It is not necessary here to repeat the list of HUD's delays and missteps other than to recall that the agency's conduct violated not only Congressional statute and HUD's own regulations but also basic principles of adjudication. *See Kelly* I, 3 F.3d. at 953-56. We follow the mandate of *Kelly* I that a respondent in a housing discrimination case cannot be made to pay for the government's neglect. *Baumgardner v. HUD*, 960 F.2d 572 (6th Cir. 1992), supports our view that an appellate court may reduce damages caused by HUD's delay.

The ALJ's initial award of over $6,000 for economic damages was based on an accrual period from the date of the incident to the date that HUD finally issued its Charge of Discrimination. While this might be a reasonable accrual period in the case where HUD processes the claim in accordance with statutory time limits, it is unreasonable where, as here, HUD takes twenty-five months to issue its Charge of Discrimination without so much as an explanation to the parties. Instead, we find that the reasonable accrual period for damages in this case is twelve months: the period within which Congress intended HUD to carry out its administrative responsibilities and the standard term of a rental lease. By the ALJ's calculations, twelve months after the incident, Ms. Staples' had incurred damages totalling $3,571.03, and this is the proper measure of her economic damages. *See* J.A. at 174, n.19. By the same reasoning, we find that the damages awarded to Ms. Staples for emotional distress and loss of

housing opportunity are more properly set at $1,000. Again, although the ALJ's award was higher, it included the period during which HUD mishandled the case. We cannot ask the Kellys to pay for emotional distress caused by HUD. Thus, we find that Ms. Staples is entitled to damages totalling $4,571.03.

2. *Attorney's fees*

The ALJ was technically correct that Ms. Staples is entitled to an award of attorneys fees and costs under the Fair Housing Act, 42 U.S.C. § 3612(p) (1988), since she prevailed on her claim of housing discrimination. In the exercise of our equitable jurisdiction, we hold, in addition, that the Kellys are entitled to some portion of their fees and costs from HUD under the Equal Access to Justice Act ("EAJA"), 28 U.S.C.A. § 2412(d)(1)(A) and 5 U.S.C. § 504(a)(1) (1988).

EAJA is a fee-shifting statute which provides that in litigation brought by or against the United States, the government shall be responsible for the attorney's fees and expenses of the prevailing party if the government's position was not "substantially justified." 28 U.S.C.A. § 2412(d)(1)(A) (1988). The Supreme Court has held that in order to be a prevailing party for the purposes of fee-shifting under the civil rights statutes, a party need not prevail on the "central issue" but may prevail on significant secondary issues. *Texas Ass'n v. Garland Independent School District*, 489 U.S. 782 (1989). Here, even though the Kellys were defeated—we believe narrowly and just barely—on the question of liability, they prevailed on several other significant issues, including the vindication of their right

to receive reasonable conciliation and to the payment of damages that reflect only the price of their conduct, not the costs attributable to the government's neglect. Thus, for the purposes of applying EAJA here, the Kellys were a prevailing party. Furthermore, although HUD's initial posture in bringing the claim may have been justified, given its untoward conduct in the case throughout, its overall position cannot be said to be "substantially justified." To fail to correct this situation and to enforce an award of attorneys' fees against petitioners without a set off or recoupment against HUD would be a dereliction of judicial responsibility of a high order.

Although this case does not present the typical EAJA award scenario, we limit our holding to these facts because we find that the circumstances for which the statute was intended present themselves here. Congress enacted EAJA in 1980 in order to curb "the unreasonable exercise of Government authority." *See* Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 La. L. Rev. 217, 220 n.1 (quoting H.R. Rep. No. 1418, 96th Cong., 2d Sess. 12 (1980)). Here, the government abused its authority by subjecting the Kellys to an unreasonable administrative procedure that not only tread dangerously close to violating their due process rights but that, if unreviewed, would have subjected them to double damages. The Kellys prevailed on not one, but two appeals at great cost to themselves. They have also incurred the increased fees of Ms. Staples due to the two

appeals. For these reasons, we find that under EAJA the Kellys are entitled to $20,000 of their fees and costs for this action.

3. Interest and Recordkeeping Requirements

The Kellys are not responsible for interest on the damage award up until this point. In *Adkins v. Asbestos Corp.*, 18 F.3d 1349 (6th Cir. 1994), this court followed the Supreme Court's decision in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990), in holding that "interest on a judgment should not accrue until the monetary damages have been meaningfully ascertained." *Adkins*, 18 F.3d at 1351. Because damages have not been "meaningfully ascertained" until now, no interest is due on any earlier award. With regard to the three-year recordkeeping requirement that was ordered by the ALJ in his initial decision to begin in February 1993, the Kellys shall comply with whatever portion of the requirement remains unmet—that is, they shall be required to keep records pursuant to the initial order for a total of three years. Any time during which they have already done so will count towards the three years.

Our dissenting colleague overlooks the fact that six judges of this court have found that the Cincinnati office of HUD has dealt unfairly with respondents in two cases brought to our court. In *Baumgardner v. Secretary of HUD*, 960 F.2d 572 (6th Cir. 1992), three judges of this court expressed more than impatience with HUD. The court noted that HUD not only failed to follow its own procedural rules in processing the Baumgardner complaint, but it failed to follow a statutory

mandate reflecting congressional concerns about timely notice to parties. *Id.* at 577. The failure of HUD to follow the statutory and regulatory rules seriously prejudiced the possibility of conciliation in that case. In *Kelly I*, 3 F.3d 951 (6th Cir. 1993), three different judges of this court stated that they were "surprised and distressed" to have another HUD case from Cincinnati where the agency "ignored time requirements and generally displayed a cavalier attitude toward the rights of parties against whom it brings charges." *Id.* at 954. In *Kelly I*, not only did HUD fail to follow the statutory mandate and its regulations with respect to timely notice, it violated its regulations by assigning the investigator Jung, who had shown a distinct bias against the respondents, as conciliator in the case. The panel in *Kelly I* believed that this assignment of Jung ruled out any real possibility of conciliation. *Kelly* I, 3 F.3d at 955. The recitations in these two opinions reflect more than just an impatience with HUD. They reflect the conclusion of the judges who studied the original records that, at least in these two cases, HUD had not been even-handed and had clearly rendered it unlikely that one of the purposes of the Act—to settle these matters by conciliation rather than litigation —would be achieved. This was ascribed to HUD's attitude, lack of concern for the rights of respondents, and refusal to follow congressional directions and its own regulations.

Conclusion

For the foregoing reasons, we REVERSE the damage award ordered below and order the Kellys to pay Ms. Staples

$4,351.03 in damages. We AFFIRM the award of attorney's fees to Ms. Staples, but REVERSE the denial of fees to the Kellys. We order the agency to pay $20,000 in attorney's fees and expenses incurred by the Kellys.

RYAN, Circuit Judge, dissenting. Although there is much in the majority opinion with which to disagree, I shall limit my strong disagreement to just two points:

- The court's reduction of the damages awarded to Dionne Staples;
- The order that HUD pay $20,000 of the Kellys' attorney fees.

I.

The ALJ awarded damages to Staples in the amount of $10,430.76 on the basis of an accrual period of 25 months, from March 1990, when Staples was wrongfully denied housing, until May 1992, the date of the HUD hearing. The ALJ calculated the period correctly because damages are recoverable from the date Staples would have moved into the denied housing until the date of the hearing. *See Miller v. Apartments and Homes of New Jersey, Inc.*, 646 F.2d 101, 112 (3d Cir. 1981). But, the majority is angry at HUD for what a previous panel of this court has found was HUD's "complete neglect" in timely resolving Staples's housing discrimination case against the Kellys. Therefore, it has reduced the award of damages to Staples from $10,430.76 to $4,571.03 stating "the reasonable accrual period for damages in this case is twelve months." Maj. op. at 4. There is absolutely nothing in the

record to support "twelve months" as the appropriate period for the damage award and, to its credit, the majority does not claim there is any record support for what it has done. The ALJ, obedient to this court's instructions in *Kelly v. HUD*, 3 F.3d 951 (6th Cir. 1993) (*Kelly I*), carefully examined the record and invited briefing from the parties in an effort to determine the duration of the period of "complete neglect" the court described in its opinion in *Kelly I*. Neither the ALJ nor the parties were able to identify any such period. Neither does the majority opinion.

It is unjust in the extreme to penalize the victim, Staples, and reward the discriminators, the Kellys, because the majority is impatient with HUD.

II.

The court has directed that pursuant to the provisions of the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(A), HUD must pay the Kellys' attorney fees in the amount of $20,000. To justify its order, the court was required to interpret the EAJA and conclude that the Kellys are "prevailing parties" and that HUD's position, vis-a-vis the Kellys, was not "substantially justified."

Section 2412(d) of the EAJA provides, in relevant part:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in

> tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, *unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.*

28 U.S.C. § 2412(d)(1)(A) (emphasis added).

It is perfectly plain from an examination of the record and the briefs of the parties that the Kellys are not "prevailing parties" in this case and that they have failed to demonstrate that HUD's position was not "substantially justified."

In order to recover attorney fees under the EAJA, a litigant must establish three conditions: 1) that it is a "prevailing party"; 2) that the government's position was without substantial justification; and 3) no special circumstances exist warranting a denial of attorney fees. *Perket v. Secretary of Health and Human Services*, 905 F.2d 129, 132 (6th Cir. 1990).

A prevailing party under the EAJA is one who "succeed[s] on any significant issue in litigation which achieves some of the benefit the part[y] sought in bringing suit." *Kreimes v. Department of Treasury*, 764 F.2d 1186, 1188 (6th Cir. 1985) (citations omitted). This court has held that to receive attorney fees from HUD under the EAJA, a party "must have prevailed in the underlying litigation against vis-a-vis HUD." *Heeren v. City of Jamestown, Kentucky*, 39 F.3d 628, 631 (6th Cir. 1994). Whether a litigant is a "prevailing party" is a factual determination that will not be disturbed absent clear

error. As a general matter, a procedural victory is insufficient to establish that a litigant has "prevailed" for purposes of an award of attorney fees under the EAJA. *Kitchen Fresh, Inc. v. NLRB*, 729 F.2d 1513 (6th Cir. 1984). Indeed, one is not a "prevailing party" simply because he obtains a remand for further proceedings before the agency from which he appealed. *Sullivan v. Hudson*, 490 U.S. 877, 887 (1989). Even a significant procedural victory, if it is not addressed to the merits of the action, does not render a litigant a "prevailing party." *Escobar v. Bowen*, 857 F.2d 644, 646 (9th Cir. 1988).

The majority opinion states that the Kellys "prevailed on several other significant issues, including the vindication of their right to receive reasonable conciliation and to damages that do not reflect the price of the government's neglect." Maj. op. at 5-6. From that, the majority concludes that the Kellys are "prevailing parties." The two most significant problems with the court's statement, of course, are first, that the Kellys did not prevail on several issues; they obtained no more than a second chance at conciliation—one issue, and a limited procedural issue at that. The majority opinion, however, includes the result of *this* appeal in the category of "issues" the Kellys "won" to justify its conclusion that the Kellys are prevailing parties. The second problem with the majority's reasoning, directly stemming from the first, is that this court is precluded by statute from considering the apparent "victory" on this appeal as a basis for determining that the ALJ "clearly erred" in finding that the Kellys were not "prevailing parties" under

the EAJA.

The majority not only credits the Kellys for a victory that could not possibly have been included in the ALJ's "prevailing party" calculus, it effectively awards the Kellys attorney fees for which they have made no request. Simply stated, the court grants the Kellys attorney fees *sua sponte*, in complete disregard of the requirements of the EAJA. The EAJA also requires that before the government can be made to pay a private litigant's attorney fees under the EAJA, it must be shown that the government's position in the litigation was not "substantially justified." The substantial justification to which the statute refers, has to do, of course, with the government's "litigating position" and not to the underlying agency position. *Trident Marine Constr., Inc. v. District Eng'r Army Corps of Eng'rs*, 766 F.2d 974 (6th Cir. 1985). Or, as stated by another panel of this court, "the governing principle of the [EAJA] is that the 'United States should pay those expenses which are incurred when the government presses unreasonable positions during *litigation.*'" *Westerman, Inc. v. NLRB*, 749 F.2d 14, 16 (6th Cir. 1984) (emphasis added) (citations omitted).

The Kellys rely on *Brooks v. Center Park Associates*, 33 F.3d 585 (6th Cir. 1994), for the proposition that when an agency action is arbitrary or unreasonable, a party is entitled to attorney fees. However, *Brooks* creates no such rule. *Brooks* involved an award of attorney fees under the Fair Housing Act to a landlord who was sued for violating the Fair Housing Act on the basis of familial status. HUD conducted an investigation

and concluded that there was no reasonable cause to believe that the landlord engaged in discrimination. The plaintiffs filed suit anyway and lost after a jury trial. The court awarded the landlord attorney fees because, manifestly, the landlord in *Brooks* was a "prevailing defendant." Nothing in the *Brooks* opinion suggests that a non-prevailing defendant is entitled to attorney fees on the basis of alleged arbitrary or unreasonable agency action. To its credit, the majority does not rely on *Brooks* in its award of attorney fees to the Kellys; it appears to rely, instead, on a determination to teach HUD a lesson.

Even if the Kellys were prevailing parties, which they are not, and the government's position was not substantially justified, which it was, the court's award of $20,000 in attorney fees for the Kellys has no basis in law or in fact. Section 2412(d)(1)(B-C) of the EAJA sets an explicit ceiling on the amount of attorney fees that may be awarded to a prevailing party. It states, in relevant part, that fees "shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A). This method of calculation is known as the "lodestar" method.

The EAJA expressly requires an attorney to submit an application that includes "an itemized statement from any attorney . . . representing . . . the party stating the actual time expended." 28 U.S.C. § 2412(d)(1)(B). Generally, this is a fact-intensive inquiry that is manifestly not appropriate for an

appellate court in the first instance. The Kellys have not complied with any of the foregoing requirements for an award of attorney fees from the government; and the majority has *sub silentio* excused them from doing so—all in disregard of the law. The result is an unedifying exercise in unrestrained judicial power.

I must, therefore, respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION TO REVIEW FINAL DECISION

Sixth Circuit Case No. 95-3008/3107/4141
Filed November 12, 1996
Rehearing Denied October 28, 1993

Pages B17 thru B33

APPENDIX B

Michael P. Kelly and John T. Kelly, Petitioners,
v.
The Secretary, United States Department of Housing and Urban Development and Dionne Staples, Respondents.

No. 92-4064

United States Court of Appeals,
Sixth Circuit.
Argued July 1, 1993.
Decided Aug. 27, 1993.
Rehearing Denied Oct. 28, 1993.

Before: Milburn and Norris, Circuit Judges; and Lively, Senior Circuit Judge.

Lively, Senior Circuit Judge.

This is a petition to review the final decision of an administrative law judge (ALJ) under the Fair Housing Amendments Act of 1988 (the Act), 42 U.S.C. § 3601, et seq. (1988). We have jurisdiction under § 3612(i). The ALJ found that the petitioners, Michael P. Kelly and John T. Kelly, violated the Act by refusing to rent an apartment owned by the Kellys because the applicant had two children. Such a refusal on the basis of "familial status" is unlawful discrimination under the prohibitions contained in § 3604. The ALJ awarded damages to the complainant, and enjoined future discrimination. See § 3612(g)(3).

Upon consideration of the record together with the briefs and oral arguments of counsel, we affirm the finding of unlawful discrimination and the injunction, vacate the award of damages and remand for further proceedings.

I.

A.

The record supports the ALJ's factual findings, which we outline below.

Dionne Staples is a single mother of twin daughters who were five years old in March 1990. In late 1989 and early 1990, Ms. Staples and her children were living with her parents in very crowded conditions. These conditions led Ms. Staples to look for an apartment. She had difficulty finding one because of her low income. In early March she spotted a sign in front of a 31-unit apartment complex at 6300 Montgomery Road in Cincinnati, Ohio, which stated that a two-bedroom apartment was available. Ms. Staples called the posted phone number on March 5th and spoke with an unidentified man. After preliminary discussions, the man asked who would be occupying the apartment. Ms. Staples explained that her two daughters would be living with her. The man then replied that she had one too many daughters and that "we only allow one child per bedroom." Approximately a month and a half later, Ms. Staples rented another apartment at Kenwood Towers that was not as convenient as the apartment on Montgomery Road. Among the advantages of the Montgomery Road apartment were that it was near Ms. Staples' friends and family, a direct

bus to her job stopped at the complex, and it was close to a drug store, grocery store, library, and parks. Kenwood Towers is not convenient to public transportation or shopping.

The apartment complex on Montgomery Road is owned by petitioners Michael Kelly and John Kelly, who are brothers, and the wife of their brother James, Kathie Kelly. It was Michael Kelly's "turn" to fill the vacancy in March 1990. The telephone number that Ms. Staples called on March 5th to inquire about the vacant apartment was the number of Michael Kelly's business, Michael P. Kelly Realty. The disputed apartment was ultimately rented to a couple without children on March 17, 1990.

After Ms. Staples was unable to rent the Kelly apartment, she called H.O.M.E., Inc., a non-profit fair housing organization. H.O.M.E. conducted an investigation using several testers who posed as prospective renters. One tester, Kathleen Lester, testified she went to the apartment building and met with Michael Kelly to discuss renting an apartment. Ms. Lester testified that when she told Michael Kelly that she had two elementary school children he "abruptly folded his arms and his eyes went towards the ceiling and he didn't say anything, but his expression on his face changed." Another tester, Adonica Jones, telephoned Michael P. Kelly Realty to inquire about an apartment that was for rent. She spoke to an unidentified woman who asked her if she was married and whether she had children. The unidentified woman explained that "she had to know because the owner only allowed one

child in the apartment."

B.

Ms. Staples filed her complaint with HUD on May 17, 1990, alleging that she had been denied an apartment because of her race and familial status in violation of the Act. HUD sent copies of the complaint to the Kellys, but only Michael received the complaint because HUD used an incorrect address for John. However, Michael did notify John of the complaint. HUD received a response on June 5, 1990, and the parties attended a conciliation meeting on July 19, 1990. The complaint was amended in late July 1990, deleting the racial discrimination claim. The complaint was amended a second time in November 1990, adding James Kelly, but HUD later dropped James Kelly as a respondent. HUD's investigator, Charles Jung, completed his investigation on October 2, 1990. HUD did not issue its Reasonable Cause Determination and Charge of Discrimination until March 2, 1992.

The ALJ held an oral hearing on May 27, 28, and 29, 1992. The ALJ concluded that the Kellys had violated the Act. He stated that "a preponderance of the evidence shows that Michael Kelly, or agents under his direction and control, intentionally engaged in conduct that made a two-bedroom apartment unavailable to Complainant and her two daughters because of their familial status." John Kelly was also found liable by virtue of his joint ownership of the complex.

While acknowledging several procedural errors committed by HUD, the ALJ held that respondents "did not demonstrate

how they suffered any substantial prejudice in the preparation or presentation of their defense as a result of HUD's failure to follow its own rules or regulations." The ALJ awarded a total of $10,430.76 in damages to Ms. Staples. The ALJ refused to award damages for future loss. Because of HUD's delay in bringing the case to adjudication, the ALJ refused to order a civil penalty. The ALJ also entered an injunction, which in part required the Kellys to refrain from discriminating, to keep records, and to make regular reports to HUD.

II.

We summarize the parties arguments on appeal.

A.

Aside from their contention that the ALJ's finding of unlawful discrimination is not supported by substantial evidence, the petitioners' principal ground for reversal lies in their claim that the Secretary violated procedural requirements of the Act and of HUD's own regulations to such an extreme degree as to deny them due process of law.

The petitioners argue first that the Secretary violated 42 U.S.C. § 3610(a)(1)(B)(ii) and 24 C.F.R. § 103.50 (1992), which provide that the Secretary is to serve the named respondent with notice of the alleged discriminatory housing practices, provide a copy of the complaint, and advise the respondent of his procedural rights and obligations within ten days after the filing of the complaint. Petitioners contend that John Kelly was not served with a copy of the initial complaint or the first amended complaint and was not provided

information about his procedural rights.

The petitioners also assert that the Secretary failed to follow §§ 3610(a)(1)(B)(iv) & (a)(1)(C). Section 3610(a)(1)(B)(iv) states that "the Secretary shall make an investigation of the alleged discriminatory housing practice and complete such investigation within 100 days after the filing of the complaint ... unless it is impracticable to do so." And § 3610(a)(1)(C) provides that "[i]f the Secretary is unable to complete the investigation within 100 days after the filing of the complaint ... the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so." *See also* 24 C.F.R. § 103.225 (1992).

The petitioners next point out that the Secretary did not comply with § 3610(g)(1): The Secretary shall, within 100 days after the filing of the complaint ... determine based on the facts whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, unless it is impracticable to do so, or unless the Secretary has approved a conciliation agreement with respect to the complaint. If the Secretary is unable to make the determination within 100 days after the filing of the complaint ... the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so. *See also* 24 C.F.R. § 103.400 (1992).

Finally, the petitioners contend that they were denied an objectively reasonable investigation and conciliation. They claim that Jung, the investigator, was so biased in the investigation and at the conciliation meeting that they could not

receive a reasonable conciliation, as required by the Act.

The petitioners also complain of the ALJ's rulings respecting answers to interrogatories, other discovery requests and requests for subpoenas to HUD officials and a HUD attorney. We find no abuse of discretion in the ALJ's rulings and will not discuss these matters further.

B.

The Secretary argues that *Baumgardner v. Secretary, HUD*, 960 F.2d 572 (6th Cir.1992), requires that any procedural errors committed by HUD be shown to prejudice petitioners substantially to warrant dismissal. The Secretary maintains that the Kellys have shown no prejudice. As to the service of the complaint, the Secretary explains that while it was unclear whether HUD technically complied with the time-limit, it does not matter, because John Kelly received actual notice from his brother Michael and John helped prepare the response to the complaint. We agree with this finding; John Kelly was not prejudiced by this particular oversight by HUD. The Secretary then addresses the time limit requirements. The Secretary admits that § 3610(a)(1)(B)(iv) and § 3610(g)(1) were not followed. The Secretary concedes that neither time limit was followed and that petitioners were not notified of this noncompliance. Again, the Secretary argues that the noncompliance is not in of itself enough to warrant dismissal. The Secretary claims that the petitioners must show that they were substantially prejudiced by the delay and the failure of notice. The Secretary relies upon the fact that the petitioners do not

contend that their ability to contest the charge was impaired in any way by these omissions. The Secretary also states that the procedural errors complained of in this case were less prejudicial than those in *Baumgardner*.

Finally, the Secretary asserts that the conciliation efforts in the present case exceeded the efforts in *Baumgardner*. In *Baumgardner* this court found a single phone contact and an unsuccessful meeting "barely sufficient." *Baumgardner*, 960 F.2d at 579. The Secretary points out that there was a conciliation meeting on July 19, 1990, and after the second complaint was served, HUD offered further conciliation. The Secretary states that petitioners simply chose not to participate in conciliation.

III.

We are surprised and distressed to have another Fair Housing Act case from Cincinnati in which HUD has ignored time requirements and generally displayed a cavalier attitude toward the rights of parties against whom it brings charges. In *Baumgardner*, we found that HUD's actions were not only "frivolous" in some respects but also involved procrastination and mismanagement of the would-be renter's complaint. We further characterized HUD's actions as "sloppy and dilatory." 960 F.2d at 580. Although we concluded that these procedural errors did not reach the level of a due process violation, we drastically reduced the ALJ's award of damages because of these transgressions. Apparently the Cincinnati office of HUD just doesn't get it.

A.

One of the most troublesome features of the present case is that the very investigator, Charles Jung, who mishandled the *Baumgardner* complaint and investigation occupied the same role in the complaint against the Kellys. The petitioners argue forcefully that Jung displayed such bias and disregard for their rights that they were prejudiced to the point of having no meaningful opportunity to settle Ms. Staples' complaint by conciliation.

The ALJ attempted to minimize Jung's influence on his final decision by stating in a footnote that "none of the liability findings in this decision depend on the credibility of HUD's investigator." This disclaimer does not reach one of the most disquieting features of HUD's performance in this case. Because of Jung's role, the conciliation efforts were seriously flawed.

HUD's regulations provide: "Generally, officers, employees, and agents of HUD engaged in the investigation of a complaint under this part will not participate or advise in the conciliation of the same complaint or in any factually related complaint." 24 C.F.R. § 103.300(c). Jung was both the investigator and conciliator. In *Baumgardner* this court stated that § 3610(b)(1)'s requirement that "the Secretary shall, to the extent feasible, engage in conciliation with respect to such complaint" means that the respondent "is entitled to an objectively reasonable effort by the agency to bring about a settlement of the charge." *Baumgardner*, 960 F.2d at 579. One

of the petitioners' strongest objections to HUD's treatment of them was based on their perception that Jung was not interested in their side of the case. One of the petitioners testified that Jung made no effort to investigate the petitioners' assertion that there was no basis for a racial discrimination complaint. Jung did not pursue evidence offered by the petitioners that numerous African-American families rented at 6300 Montgomery Road and continued to include a charge of racial discrimination long after even a cursory investigation would have proven it baseless. Yet, when the petitioners attended a conciliation meeting they were confronted with investigator Jung as HUD's conciliator. Furthermore, § 3610(b)(1) states that conciliation should take place until "the filing of a charge or a dismissal by the Secretary...." The record reveals that Jung made no contact with the petitioners concerning conciliation between the completion of the investigation in October 1990 and the issuance of the charge in March 1992.

It is also clear that after the July conciliation meeting, Jung offered further conciliation in a cursory fashion. This was in the form of suggesting to the Kellys that they "reconsider resolution" at the end of the cover letter accompanying the first amended complaint. In addition, Jung admitted in his testimony that he did no investigation before the conciliation. Petitioners' attorney asked Jung: "Now, will you agree with me that you did nothing to investigate the race portion of Ms. Staples' complaint between the time you received it and 7/19/90 [the conciliation meeting date]?" Jung answered: "I

would say you're right." Petitioners' attorney then asked: "And you'll agree with me that we're talking up to conciliation, from conciliation until 7/27/90 you'll agree that you didn't do anything to investigate it?" Jung answered: "Correct."

In view of Jung's unwarranted procrastination in processing the complaint and attempting to bring it to a satisfactory conclusion and the obvious antagonism that had developed between him and the petitioners, he should not have acted as conciliator in this case. With him in that role, HUD did not make "an objectively reasonable effort ... to bring about a settlement of the charge." *Baumgardner*, 960 F.2d at 579.

B.

In his decision in this case, the ALJ described the purpose of providing for administrative adjudication of housing discrimination complaints as follows: When Congress authorized administrative adjudication in 1988, it intended to provide a "speedy, fair, and inexpensive" procedure for resolving housing discrimination complaints. Toward that end, the Act contains numerous time limitations. For example, HUD is required to complete its investigation and issue a reasonable cause determination within 100 days of the filing of the complaint; an administrative hearing must begin no later than 120 days after the issuance of a charge of discrimination; the decision of the administrative law judge is to be issued within 60 days after the end of the hearing; and the Secretary's discretionary review must be completed not later than 30 days after issuance of the decision. Taken together, these time

limitations indicate that Congress expected that a housing discrimination complaint brought before an administrative law judge would reach completion within less than a year after the filing of the complaint with HUD. (footnotes omitted).

The ALJ then concluded: However, almost exactly two years elapsed from the date Complainant telephoned H.O.M.E. to complain that she was a victim of housing discrimination until the date HUD issued its Reasonable Cause Determination and Charge of Discrimination. By the time this decision becomes final, at least two and one- half years will have passed. There is no justification in the record for this delay, particularly the 17-month period between October 2, 1990, when HUD's investigator completed his investigation, and March 2, 1992, when the Reasonable Cause Determination and Charge of Discrimination was issued. Clearly, in the instant case the parties have not been afforded the speedy resolution of the complaint required by the Act. (citation omitted).

C.

Despite these findings of clear and unexplained violations of provisions of the Act intended to avoid delay and undue expense, the ALJ concluded that the Kellys did not suffer a due process violation. This determination was based primarily upon the fact that the petitioners could demonstrate no prejudice from the delays. It is true that the delays do not appear to have prejudiced the petitioners' ability to defend against the charge of a violation. Thus, we agree with the ALJ to the extent he concluded that his liability determination was

not affected by the delays. The ALJ recognized, however, that the delay did increase Ms. Staples' claim for damages, and attempted to take this into account by declining to assess a civil penalty.

We also agree with the ALJ's conclusion that the City of Cincinnati Building Code requirement that an apartment occupied by three persons must have a total living space of at least 350 square feet provides no defense. The Code states that a room occupied on a regular basis by two persons for sleeping purposes must have an area of at least 100 square feet. The apartment that Ms. Staples wanted to rent has a total of 503 square feet, and the larger bedroom has an area of 145 square feet. The petitioners' assumption that the adult would occupy the larger bedroom, leaving the two children crowded into the smaller (70 square feet) bedroom is entirely speculative. No one even asked Ms. Staples how the space would be used if she were given an opportunity to live in the apartment.

The ALJ never got to the heart of the petitioners' assertion that they were afforded no objectively reasonable effort to settle this claim by conciliation. The fact that a conciliation meeting was held, with Jung as conciliator, and that another was proposed without a change in conciliator does not answer the Kellys' objections to this procedural error.

One thing further needs to be said about the ALJ's treatment of the petitioners' objections to the conciliation process. Section 3610(d)(1) prohibits making public or using as evidence in subsequent proceedings anything said or done

during a conciliation without the written consent of the persons concerned. This confidentiality provision prevents disclosure of offers, submissions, concessions and similar negotiating efforts during conciliation, but it does not preclude an examination of the conciliation process itself.

IV.

A.

The Fair Housing Amendments Act of 1988 made several significant changes in the procedures followed under the original Fair Housing Act. Probably the most important of these was the creation of an administrative enforcement mechanism. Under the original Act HUD had no enforcement authority; it could use only informal methods of persuasion and conciliation, with no power to sue violators, as in other civil rights laws. In his message to Congress transmitting the Proposed Fair Housing Amendments Act of 1988, President Reagan wrote:

> Since its passage, however, a consensus has developed that the Fair Housing Act has delivered short of its promise because of a gap in its enforcement mechanism. The gap in enforcement is the lack of a forceful back-up mechanism which provides an incentive to bring the parties to the conciliation table with serious intent to resolve the dispute then and there. When conciliation fails, the Secretary has no place else to go. In those few cases where good will is absent, the exclusive reliance upon voluntary resolution is, in the words of former Secretary Carla Hills, and [sic] 'invitation to

intransigence.' Reform of the Fair Housing Act is a necessity that is acknowledged by all.

Quoted in H.R.Rep. No. 100-711, *reprinted in* 1988 U.S.Code Cong. & Adm.News, 2d Sess., 2173, 2177-78 (footnote omitted).

With respect to the 100 day limit for completing the investigation of a complaint, the House Report stated:

> The Secretary will investigate the complaint following its filing and will complete the investigation within a 100 day period, unless it is impracticable to do so. The Committee intends that in these exceptional cases the investigation must be completed as soon as possible thereafter. If the Secretary cannot complete the investigation within 100 days, then the Secretary is required to notify the parties and explain the reasons for the delay.

Id. at 2194-95 (italics added).

Concerning the importance of conciliation, the Report stated:

> The Committee intends for conciliation to remain a primary feature of fair housing enforcement. Resolving a complaint in the early stages of the process benefits all parties. Unlike current law, however, under the bill, if conciliation fails, then HUD can continue to enforce the law through the administrative process.

Id. at 2195.

B.

We understand, of course, that the principal purpose of

both the original and amended Acts is to vindicate the rights of persons who suffer discrimination in housing. Nevertheless, those against whom complaints are made are entitled to fair treatment as well. Of course, we do not want to penalize the complainant for HUD's errors. Nevertheless, we must exercise a balance that clearly has been lacking in this case.

The record offers no explanation for the procedural lapses that occurred in this case. This was not an exceptional case. It involved a single complaint that should have been resolved either by conciliation or enforcement well within the statutory time limits. The delays were inexcusable and the failure to follow the general requirement that an investigator not be involved in conciliation of a complaint he has processed nullified any real possibility of resolving it by conciliation.

While we agree with the ALJ that the petitioners were not prejudiced by the delays insofar as the finding of a violation is concerned, we believe the parties should be given an opportunity to resolve this matter by means of a fair and reasonable conciliation effort. Otherwise, the Act's laudable goal of keeping conciliation as "a primary feature of fair housing enforcement" will be thwarted. Accordingly, we vacate the award of damages and remand to HUD for the purpose of conducting conciliation with a qualified conciliator other than Charles Jung, who has had no previous contact with this case. If conciliation fails, the case will be returned to the ALJ for reconsideration and such further proceedings as may be required in light of this opinion; but in no case should damages

be assessed for the period during which HUD completely neglected this case.

Affirmed in part, vacated in part, and remanded for further proceedings as outlined herein.

APPENDIX C

UNITED STATES COURT OF APPEALS
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT

OFFICE OF AMINISTRATIVE LAW JUDGES

INITIAL DECISION

HUDALJ No. 90-0879-1
Decided August 26, 1992

C34 thru C86

APPENDIX C

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Office of Administrative Law Judges

The Secretary, United States Department of Housing and Urban Development, on behalf of Dionne Staples, *Charging Party,* v. Michael P. Kelly and John T. Kelly, *Respondents.*	**CORRECTED COPY** HUDALJ 05-90-0879-1 Decided: Aug. 26, 1992

Robert G. Kelly, Esquire
For the Respondents

Michael J. Mooney, Esquire
For the Complainant

Konrad J. Rayford, Esquire
For Charging Secretary

Before: Thomas C. Heinz, *Administrative Law Judge*

INITIAL DECISION

STATEMENT OF THE CASE

This proceeding arises out of a complaint filed by Dionne Staples ("*Complainant*") alleging that Michael P. Kelly and John T. Kelly ("*Respondents*") violated the Fair Housing Act, 42 U.S.C. Sec. 3601 *et seq.* (sometimes "the Act"), by refusing to negotiate the rental of a dwelling; discriminating in the terms, conditions, or privileges of rental of a dwelling; and making statements concerning the rental of a dwelling that indicated a preference, limitation, or discrimination based on the familial status of Complainant. The Department of Housing and Urban Development ("HUD", "the Secretary," or "the Government") investigated the complaint, and after deciding that there was reasonable cause to believe that discriminatory acts had taken place, issued a Charge of Discrimination against the Respondents on March 2, 1992.[1] The Charge alleged violations of sections 804(a), (b), and (d) of the Act (42 U.S.C. Secs.(a), (b), and (d)), as well as sections 100.60, 100.65, 100.70 and 100.75 of the regulations promulgated thereunder (24 C.F.R. Secs. 100.60, 100.65 100.70, and 100.75).

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[1]James Kelly was also named as a Respondent in the Charge, but he was later removed from the case pursuant to a stipulation between the parties. Order, May 21, 1992.

After Answers were filed to the Charge and Complainant was granted permission to intervene, an oral hearing was held on May 27, 28, and 29, 1992 in Cincinnati, Ohio, at the close of which the parties were ordered to file proposed findings of fact, conclusions of law, and briefs in support thereof. The last brief was received July 23, 1992. On August 1, 1992, Respondents filed a Reply Memorandum and Request For Acceptance. The request will be granted.

Findings of Fact

1. Complainant Dionne Staples is an African-American, single mother of twin daughters who were five years old in March 1990. Tr.280.[2] She works full-time as an accounts-payable clerk for John Morrell & Co., where she earned approximately $16,000 per year (or $8.17 per hour) in March 1990. Tr.290. In late 1989 and early 1990, Complainant and her children were living with her parents in the Pleasant Ridge-Silverton area of Cincinnati, Ohio, in very cramped quarters where all five people slept in the same room. Tr.299, 307. These unsatisfactory living conditions created considerable tension in the family and prompted Complainant's parents to ask that she find another place to

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[2]The following reference abbreviations are used in this decision: "Tr." for "Transcript"; "SX. for "Secretary's exhibit"; and "RX." for "Respondents' exhibit".

live. Complainant searched for better accommodations for several months, but she had great difficulty finding a suitable apartment because of her low income. Tr.298.

2. In early March 1990 a sign was posted in front of a 31-unit apartment complex at 6300 Montgomery Road in Cincinnati that said, "apartment available, two bedroom, one and a half baths," and gave a telephone number, 321-0077. Tr.281, 413. Complainant called that telephone number on March 5, 1990, and spoke with an unidentified man who answered the telephone. She testified that after some preliminary discussion about the apartment:

> He then asked me who would be occupying the apartment. I told him myself and my two daughters. And he said, oh, well, we have a problem. And I said, a problem, he said, yes. He said, you have one to[o] many children. And I said, one to[o] many children? He said, yes, we only allow one child per bedroom. And I said, oh. There was a short pause and I said okay, thank you, good-bye.

Tr.2O2. *See also* SX.3.

3. As a person without an automobile, Complainant was particularly interested in the apartment at 6300 Montgomery Road because she considered the location ideal: it is near her parents and friends in an area of the city where

she grew up; a direct bus to her job stops in from of the complex; a drug store is a block; away; it is close to a library and to a school for her daughters; a grocery store is within one or two blocks; the complex is in "a nice residential area with children and sidewalks"; and there are parks nearby. SX.3; Tr.303, 304. Furthermore, she had been told by an acquaintance that the rent for a twobedroom unit was $375 per month, an amount she felt she could afford, particularly since her parents were willing to co-sign a lease. SX.3.

4. After completing her telephone inquiry regarding the apartment at 6300 Montgomery Road, Complainant made no further attempt to rent an apartment there. Rather, she continued to search elsewhere. Approximately a month and a half later, she and her daughters moved into an apartment that rents for $425 per month in a complex called "Kenwood Towers," located in a secluded, wooded area with no sidewalks and no play area. The complex does not have convenient public transportation or shopping, but tenants do have the use of a pool and barbecue pits. Tr.304-05, 332.

5. Complainant must leave for work before her children go to school. If she had rented an apartment at 6300 Montgomery Road, her parents could have picked up the children in the morning before she left for work on the bus at 7:25 a.m. Now she leaves her home at 7:00 a.m., drives 3.5 miles to her parents' home in an automobile borrowed from

her parents, leaves her daughters in her parents' care, and drives another 3.5 miles from her parents' home to a shopping area where she parks the car and at 7:35 a.m. catches the same bus to work she would catch if she lived at 6300 Montgomery Road. In other words Complainant's commute to and from work is 25 minutes longer each way and more complicated than it would have been if she had become a tenant at 6300 Montgomery Road. Tr.307-09.

6. Complainant is able to borrow her parents' car only five days a week. Therefore, if she needs to go somewhere on the weekend, she must call someone to ask for a ride because she does not have access to convenient public transportation. Tr.310.

7. Six to eight months after moving into Kenwood Towers, Complainant, concluding that the apartment was unsatisfactory, began looking for another residence. Tr.301. Until the date of the hearing, she continued to go through the newspaper and make telephone calls seeking an apartment closer to her parents and friends, but had been unable to find one within her budget. Tr.301.

8. The apartment at 6300 Montgomery Road that Complainant sought to rent was rented on March 17, 1990, to a couple without children. Answer of Respondent Michael P. Kelly, p.2.

9. Respondents Michael P. Kelly and John T. Kelly are brothers who, together with Kathie Kelly, the wife of their brother James, own the apartment complex at 6300 Montgomery Road. Respondents and their brother James purchased the complex in 1978, but James transferred him interest to his wife in December of 1989. Tr.459, 578; SX.16. Profits and expenses are divided equally among the owners. Tr.488, 528, 579, 610. When an apartment becomes available for rent, responsibility for finding a new tenant is assumed on an ad hoc basis by one of the Kelly brothers. In the words of Respondent Michael P. Kelly, they "take turns." Tr.460, 461, 578; SX.15. Kathie Kelly does not participate in the rental of the apartments, except for taking telephone calls at her home when it is James Kelly's turn to rent an apartment. Tr.579-580.

10. Respondent John Kelly has been a federal administrative law judge in Cincinnati since 1978. Tr.592.

11. Respondent Michael Kelly has been a real estate broker since 1983. He is the sole owner of Michael P. Kelly Realty company, with offices at 3330 Erie Ave., Cincinnati, Ohio. Tr.459, 474. In March 1990, six people worked at Michael P. Kelly Realty, two of whom were women. Tr.519, 553. The telephone number Complainant called on March 5, 1990, to inquire about the apartment is the telephone number of Michael P. Kelly Realty company. Tr.462. Everyone at

Michael P. Kelly Realty was authorized to answer telephone inquiries about vacant apartments at 6300 Montgomery Road. Tr.559.

12. In March 1990 it was Respondent Michael Kelly's "turn" to find a tenant for an apartment at 6300 Montgomery Road. Tr.461.

13. Immediately after Complainant's telephone conversation of March 5, 1990, regarding the apartment for rent at 6300 Montgomery Road, she called H.O.M.E., Inc., a nonprofit fair housing organization in Cincinnati. Tr.312. Prompted by Complainant's contact, H.O.M.E. conducted an investigation using several testers who posed as prospective renters of the apartment. Two of them, Kathleen Lester and Adonica Jones, testified.

14. On March 7, 1990, pursuant to an appointment, Ms. Lester went to 6300 Montgomery Road to meet Michael Kelly. After they discussed the apartment, Respondent Michael Kelly asked Ms. Lester if she lived alone, to which she replied:

And I said, no, I had two elementary school children.

Q. What happened at this point?

> Before then, Mr. Kelly had maintained eye contact with me. When I told him I had two children, he very abruptly folded his arms and his eyes went towards the ceiling and he didn't say anything, but his expression on his face changed.
>
> * * *
>
> I believe he was not pleased with the fact that I said I had two children.

Tr.63. *See also* SX.5.

15. On March 12, 1990, Adonica Jones, a tester for H.O.M.E. telephoned Michael P. kelly Realty to inquire about the two-bedroom apartment for rent and spoke with an unidentified woman who asked if Ms. Jones was married and had children, explaining that "she had to know because the owner only allowed one child in the apartment." Tr.34. *See also* SX.4.

16. Under the City of Cincinnati Building Code, an apartment occupied by three persons must have a total living area of at least 350 square feet. A bedroom for one person may have a floor area as small as 70 square feet, but a room occupied on a regular basis by two persons for sleeping purposes must have a minimum of 100 square feet of floor space. SX.20; Tr.95, 396, 398, 405, 412.

17. The two-bedroom unit at 6300 Montgomery Road sought by Complainant, apartment number 10, has a total living area of approximately 503 square feet. The floor space measures approximately 145 square feet in the larger bedroom and about 94 square feet in the smaller bedroom. SX.19. Complainant and her two daughters could have lived in apartment 10 without violating the City of Cincinnati Building Code.

18. At the time of HUD's investigation of this case, two of the 31 rental units at 6300 Montgomery Road were occupied by families with two children. In one of these, the children arrived after the tenancy began. The lease for the other family was signed by Respondent John Kelly in June of 1989, approximately three months after the Fair Housing Amendments Act became effective. Six apartments had tenants with one child, and the remainder had no children. SX.22; Tr.97-9. Respondent John Kelly testified that he rented an apartment to an unidentified third family with two children in 1983. Tr.480, 582.

19. Complainant filed her complaint with HUD on May 17, 1990. Copies of the complaint and cover letters were sent on May 18, 1990, to Michael Kelly at 2147 St. James Ave., Cincinnati, Ohio; John Kelly at 2147 St. James Ave., Cincinnati, Ohio; and Michael P. Kelly Realty Co., 3330 Erie Ave., Cincinnati, Ohio. Respondent Michael Kelly signed a

return receipt card evidencing receipt of the material sent to Michael P. Kelly Realty Co. on May 24, 1990. Shortly thereafter, Respondent Michael Kelly mailed a copy of the complaint to Respondent John Kelly. Neither Respondent has ever lived or worked at 2147 St. James Ave.[3] Tr.7-10, 591. That address was mistakenly entered on the complaint by an employee of H.O.M.E. who also mistakenly included race as a basis for the complaint. Tr.430, 432.

20. On June 5, 1990, HUD received a written response to the complaint from Respondent Michael Kelly in which he mistakenly identified his brother James (rather than James' wife) as the third owner of 6300 Montgomery Road. SX.15. The response was written with the assistance of Respondent John kelly and notarized by another Kelly, Robert. *See* Finding of Fact 9, *supra.* Tr. 473, 474.

21. Both Respondents attended a conciliation meeting

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[3]The return receipt card for the material addressed to John Kelly was returned to the Government with a signature that is difficult to decipher but that could reasonably be interpreted by someone unfamiliar with John Kelly's handwriting as the signature of John Kelly. *See* exhibit 3 in the Secretary's Memorandum in Opposition to Respondents' Motion to Dismiss, dates May 20, 1992. After receiving the return receipt card, the Government appears to have continued to prosecute the case on the basis of such an interpretation until shortly before the case went to trial.

with HUD officials on July 19, 1990. RX.5, Tr.83, 460, 597.

22. On July 27, 1990, HUD sent an amended complaint to Michael and Jack Kelly at 3330 Erie Avenue, the address of Michael P. Kelly Realty.[4] The amended complaint removed race as a basis for the action. Tr.473, 474.

23. On August 8, 1990, HUD received from Respondent John Kelly a written response to the amended complaint of July 27, 1990, in which he states, *inter alia*, that he was not named in the original complaint, but that he is named in the amended complaint, thereby acknowledging that he had received actual notice of Complainant's allegations that she had been a victim of housing discrimination in connection with an apartment at 6300 Montgomery Road. SX.17.

24. HUD made offers to conciliate the complaint to either Respondent Michael Kelly or Respondent John Kelly on May 24, 1990, July 19, 1990, July 27, 1990, August 2, 1990, and September 19, 1990. Tr.561, 598, 642; RX.5, p.3; SX.16.

25. On November 5, 1990, HUD prepared for

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[4]HUD's investigator sometimes referred to Respondent John Kelly as "Jack Kelly". *See, e.g.*, SX.17, 18.

Complainant's signature a second amended complaint naming James Kelly as a respondent. The complaint was sent via certified mail to an incorrect address and the return receipt card was not returned. The Government later dropped James Kelly as a respondent from this ease.

26. The Secretary failed to complete the investigation of Complainant's allegations of housing discrimination by August 25, 1990 -- that is, within 100 days of the filing date of the complaint -- and failed to notify Respondents of the reasons why the investigation could not be completed within 100 days, as required by 24 C.F.R. Sec. 103.225. Secretary's Motion of May 20, 1992, p.5.

27. The Secretary failed to make a reasonable cause determination within 100 days of the filing of the complaint as required by 24 C.F.R. Sec. 103.400, and failed to notify Respondents of the reason for the delay, as required by 24 C.F.R. Sec. 103.400(e)(2). Secretary's Motion of May 20, 1992, p.5.

28. On March 2, 1992, almost exactly two years after the events occurred that form the basis of this ease, the Secretary issued the Reasonable Cause Determination and Charge of Discrimination.

Subsidiary Findings and Discussion

The Congress passed the Fair Housing Act to "[e]nsure the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics". *United States v. Parma,* 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), *rev 'd on other grounds,* 661 F.2d 562 (6th Cir. 1981), *cert. denied,* 465 U.S. 926 (1982). *See also United States v. City of Black Jack* 508 F.2d 1179 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975); *cf. Griggs v. Duke Power Co.,* 401 U.S. 424 (1971). The Act was designed to prohibit "all forms of discrimination [even the] simple-minded." *Williams v. Matthews Co.,* 499 F.2d 819, 826 (8th Cir. 1974).

On September 13, 1988, the Act was amended to prohibit, *inter alia,* housing practices that discriminate on the basis of familial status.[5] 42 U.S.C. Secs. 3601-19. "Familial

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[5]In amending the Act, Congress recognized that "families with children are refused housing despite their ability to pay for it.. HR. Rep. No.711, 100th Cong., 2d Sess., at 19 (1988). Congress cited a survey finding that 25 percent of all rental units exclude children and that 50 percent of all rental units have policies restricting families with children in some way. *Id, citing,* Marans, *Measuring Restrictive Rental Practices Affecting Families with Children: A national Survey,* Office of Policy Planning and Research HUD (1980). The survey found also that almost 20 percent of families with children were forced to live in undesirable housing due to restrictive housing policies. *Id.* Congress therefore intended the 1988 amendments to remedy these

status," as relevant to this case, is defined by the Act as "one or more individuals (who have not attained the age of eighteen years) being domiciled with ... (1) a parent or another person having legal custody of such individual or individuals ...." *Id.* at Sec. 3602(k); 24 C.F.R. Sec. 100.20. Complainant and her daughters fall within this definition.

The Act makes it unlawful for anyone to:

> refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of...familial status...

42 U.S.C. Sec. 3604(a). Furthermore, the Act prohibits a housing provider from:

> discrirninat[ing] against any person in the terms, conditions, or privileges of sale or rental of a dwelling ... because of familial status ...

42 U.S.C. Sec. 3604(b).

Finally, it is unlawful to:

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problems for families with children.

> make ... any ... statement ... with respect to the ... rental of a dwelling that indicates any preference, limitation, or discrimination based on ... familial status ... or an intention to make any such preference, limitation, or discrimination.

Id. at Sec. 3604(c). This provision applies to all written or oral statements made by a person engaged in the rental of a dwelling. 24 C.F.R. Sec. 100.75(b), (c)(1) and (2).

The record in the instant case contains both direct and indirect evidence of housing discrimination. Complainant credibly testified that when she inquired about a twobedroom apartment at 6300 Montgomery Road to be occupied by her and her two children, she was told that she had "one child too many." That is direct evidence of discrimination, inasmuch as the apartment could be lawfully occupied by three persons.

Respondent Michael Kelly testified that he does not remember speaking with Complainant on March 5, 1990,[6] but in a letter to HUD dated August 7, 1990, he seemed to admit that he or one of his agents may have made a mistake:

> If HOME, the recognized expert in discrimination

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[6]Tr.460

matters, can make an honest mistake regarding a race discrimination charge, cannot other individuals, like me, make an honest mistake regarding space requirements for renters?

Respondent Michael Kelly's testimony at hearing contrasted sharply with his August 7, 1990, letter to HUD. At hearing he contended that he has not had a "policy" regarding the number of children who may occupy a two- bedroom apartment at 6300 Montgomery Road. Tr.538. His protests to the contrary notwithstanding, the evidence clearly demonstrates that Respondent Michael Kelly has followed a "policy". He testified to the effect that he had adopted a course of action that he called, "one child per bedroom". Tr. 538. On the face of it, such a policy would permit a single parent and two children to occupy a two-bedroom apartment at 6300 Montgomery Road, assuming that one of the children shared the larger bedroom with the parent. However, that was not Respondent Michael Kelly's assumption in 1990. In his letter to HUD of August 7, 1990, he wrote:

> In my twelve years of renting apartments at 6300, I have yet to experience, and certainly have never expected, an adult to occupy the smaller bedroom and to give the larger bedroom with the 1/2 bath to a child or children. Nor have I seen, nor do I expect, an adult to share the larger bedroom with a child if such can be

> avoided, as here, by putting the child or children in the smaller bedroom. Further, neither the complainant, nor any other person has ever represented to me that he/she would sleep two children in the larger bedroom and one adult in the smaller bedroom, or an adult and one child in the larger bedroom and one child in the smaller bedroom.
>
> Thus, regardless that in hindsight someone can argue that two children, or an adult and one child, can *theoretically* [emphasis in original] be placed in the smaller bedroom. [*sic*] This situation would then put me in possible violation of the City Health Code because I should have known, based on common sense and my rental experience, that both children would be placed in the smaller bedroom.

SX. 16. In other words, he clearly assumed that if he were to permit an adult and two children to occupy a two- bedroom apartment, the two children would sleep in the smaller bedroom, and he did not want that to happen. This evidence shows that Respondent Michael Kelly's policy for a two-bedroom apartment was not in fact "one child per bedroom," but rather, "one child per apartment". His agent at Michael P. Kelly Realty told Ms. Jones, a H.O.M.E. tester, when she called to inquire about a two-bedroom apartment, "the owner only allowed one child in the apartment." Tr.

34-35. Furthermore, the fact that the occupancy policy was cast in terms of *children* rather than in terms of *people* in itself indicates an intent to discriminate against children. Tr. 539, 540.

Ms. Jones provided direct evidence of discrimination against Ms. Jones, but neither Ms. Jones nor H.O.M.E. is a party to this case. Therefore, Ms. Jones' evidence only indirectly shows discrimination against Complainant. Her evidence strongly implies that Complainant's experience was not an aberration and that there was a policy at 6300 Montgomery Road to exclude tenants with two children from occupying a two-bedroom apartment.

The evidence supplied by Ms. Lester, the other tester witness, is also indirect. Ms. Lester's observation of Respondent Michael Kelly's body language gave her the impression that he was not pleased when she told him that she had two children. Standing alone, that evidence proves very little. However, viewed in the light of the entire record, Ms. Lester's impression lends some support to the argument that Respondent Michael Kelly had a policy against renting to tenants with two children.

At the time of the investigation, there were only two tenants with two children out of the 31 rental units in the complex at 6300 Montgomery Road, and in one of those

cases, the children arrived after the tenancy began. However, the Government did not prove what proportion of the apartments have two bedrooms. Without that proportion in evidence, the demographics of 6300 Montgomery Road have no probative value for the Government's case.

In any event, even if Respondents did not have a uniform policy of excluding tenants with two children, they are liable for their unlawful discrimination against Complainant. Evidence that a landlord has rented to members of a protected class in the past does not foreclose a claim of intentional discrimination. *See Asbury v. Brougham,* 866 F.2d 1276, 1281 (10th Cir. 1989).

Respondents miss the mark with their argument that they relied upon advice from H.O.M E. *See* Tr.185, 613; SX.15. The record does not show that anyone at H.O.M.E; gave Respondents incorrect advice upon which Respondent Michael Kelly relied when he established the policy leading to the discrimination suffered by Complainant.[7]

Respondents also miss the mark with their argument that the "one child per bedroom" policy was formulated in

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[7]Even if Respondents had proved they relied on bad advice, they would still be liable. H.O.M.E. is a private organization. The actions of a private organization cannot estop the Government's enforcement of the Fair Housing Act.

order to comply with the occupancy standards in the Cincinnati Building Code. The occupancy standards provide no refuge from liability, because the Code permits a parent and two children to occupy the two-bedroom apartment sought by Complainant at 6300 Montgomery Road. Tr.396-97, 412; SX.19, 20. In a closely related argument, Respondents also seem to contend that the "one child per bedroom" policy was formulated out of fear that two- children families would violate the Building Code, thereby exposing Respondents to sanctions by the City. But the testimony of City officials called on Respondents' behalf to explain the Building Code and its enforcement revealed no realistic basis for Respondents to fear that they would be prosecuted if tenants failed to configure their sleeping arrangements in accordance with the Code. In any event, the possibility that a potential tenant may violate a city occupancy standard in the future does not give the landlord permission to discriminate against that tenant in violation of the Fair Housing Act. Moreover, Respondents' arguments implicitly acknowledge that two-children families have been turned away; that is, the arguments admit discrimination against tenants with two children.

In short, a preponderance of the evidence shows that Respondent Michael Kelly, or agents under his direction and control, intentionally engaged in conduct that made a two-bedroom apartment unavailable to Complainant and her two

daughters because of their familial status. Section 3604(a) of 42 U.S.C proscribes any conduct that makes housing unavailable, as well as all practices that have the effect of denying dwellings on prohibited grounds, and that in any way impede, delay, or discourage a prospective buyer or renter. *United States v. Youritan Construction Co.*, 370 F.Supp. 643, 648 (N.D.Cal. 1973), modified on other grounds, 509 F.2d 623 (9th Cir. 1975); *Zuch v. Hussey*, 394 F.Supp. 1028, 1047 (E.D.Mich. 1975). Section 3604(a) may be violated without an outright refusal to deal or negotiate and without proof of specific intent.

The statement made by Respondent Michael Kelly or one of his male agents to Complainant that she "had one child too many", as well as the statement made by one of Respondent Michael Kelly's female agents to Ms. Jones that she had to know whether Ms. Jones had any children "because the owner only allowed one child in the apartment" violated 42 U.S.C. Sec. 3604(c). These statements and conduct also violate 42 U.S.C Sec. 3604(b) prohibiting "discrimination against any person in the terms, conditions, or privileges of ... rental of a dwelling ... because of familial status ...."

As for Respondent John Kelly, his liability rests on his status as co-owner of the property and partner of Respondent Michael Kelly. Tr.488, 610. Respondent John Kelly had no

contact with Complainant until after she filed her complaint, and, aside from the admissions implicit in the arguments posed in defense, there is no proof that he participated in the formulation of the so-called "one child per bedroom" policy. SX.17. Complainant and the testers from H.O.M.E. dealt only with Respondent Michael Kelly and people working at Michael P. Kelly Realty. The record does not demonstrate that any of the people who answered the telephone at Michael P. Kelly Realty did so under the direction and control of Respondent John Kelly. Nevertheless, when Respondent Michael Kelly took his "turn" to rent apartment number 10, he acted as the agent for Respondent John Kelly. *See* Restatement (Second) Agency § 14A; Ohio Rev. Code Ann. § 1775.06 (Anderson 1985). As a joint owner who shares equally in the profits and expenses generated by the property, Respondent John Kelly could not delegate his duty to prevent housing discrimination to his brother or to his brother's agents.[8] In other words, Respondent John Kelly's liability in

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[8] *Hamilton v. Svatik,* 779 F.2d 383, 388 (7th Cir. 1985); *Green v. Century 21,* 740 F.2d 460, 465 (6th Cir. 1984); *Marr v. Rife* 503 F.2d 735, 741 (6th Cir. 1974); *Saunders v. General Servs. Corp.,* 659 F.Supp. 1042, 1059 (ED.Va. 1987), *Davis v. Mansards,* 597 F.Supp. 334, 344 (ND. Ind. 1984); *United States v. Youritan Construction Co.,* 370 F.Supp. 643, 649 (N.D.Cal. 1973), *modified an other grounds,* 509 F.2d 623 (9th Cir. 1975), *cert, denied,* 421 US. 1002 (1975). Respondent Michael Kelly is likewise liable for the acts of the unidentified persons working at Michael P. Kelly Realty who answered the telephone on his behalf. They were his agents.

this case is vicarious.[9]

Respondents focus most of their defense on the conduct of HUD's investigator and counsel for the Government rather than the merits of their case. They deliver a broadside attack demanding dismissal of the charges and alleging, *inter alia,* incompetence, deliberate misrepresentation, duplicity, dishonesty, and deliberate deception of the Court by the Government. Respondents' Brief, pp. 7, 17,19, 22, 23, 24; Respondents' Reply Memorandum. While HUD's investigation and presentation of the case were far from perfect, the Government's errors were not so prejudicial to the Respondents that the Charge of Discrimination must be dismissed.

HUD committed several procedural errors during the conduct of the investigation leading to issuance of the Charge of Discrimination on March 2, 1992. The Complainant filed her complaint with HUD on May 17, 1990. The statute and

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[9]In fact, there is some suggestion in the record that Respondent John Kelly may have been aware that the two-bedroom apartments at 6300 Montgomery Road must be made available to a parent with two children. In June of 1989 he signed the lease for the only documented instance in the record where a family with two children successfully applied for an apartment. SX.22(e).

the regulations require that the complaint be forwarded to the person allegedly responsible within 10 days. Although Respondent Michael Kelly received a copy of the original complaint on May 24,1990, and mailed a copy to Respondent John Kelly shortly thereafter, Respondent John Kelly testified he did not know that he was a named party in the ease until he received a copy of the amended complaint of July 27, 1990. Tr. 599, 628. The amended complaint, like the original complaint, was mailed to the business address of Respondent Michael Kelly but not to Respondent John Kelly's home or business address. Nevertheless, both Respondents received *actual* notice of the complaint filed by the Complainant and had ample opportunity to respond to it before the Secretary issued a reasonable cause determination. Nothing more is required to satisfy due process requirements.[10] To be sure, the Government was sloppy in discharging its duty to notify Respondents of the allegations in the complaint, but that is merely an embarrassing, not a fatally defective, error.

Citing *Baumgardner v. HUD,* 960 F.2d 572 (6th Cir. 1992), Respondents also argue that they were not afforded a reasonable opportunity to conciliate the complaint, and that the case must therefore be dismissed. That argument has no merit. Section 3610(b)(1) of 42 U.S.C. requires HUD "to the

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[10]Federal Rules of Civil Procedure service requirements do not apply to this administrative proceeding.

extent feasible to engage in conciliation with respect to the Complaint." According to the court in *Baumgardner*:

> While a respondent is certainly not entitled to a successful conciliation, he is entitled to an objectively reasonable effort by the agency to bring about a settlement of the charge.

960 F.2d at 579. The *Baumgardner* court concluded that HUD's conciliation efforts satisfied the requirements of 42 U.S.C. Sec. 3610(b)(1), even though HUD had only one telephone call contact and one unsuccessful meeting with the respondent to discuss conciliation. In the instant case, Respondents were offered, either singly or together, an opportunity to settle the case on at least five occasions before HUD made the reasonable cause determination. Tr.561, 598, 642. Although the *Baumgardner* decision does not explain how to determine whether an "objectively reasonable effort" to conciliate has been made, in light of the court's conclusion that two conciliation efforts by HUD were sufficient, I find that HUD's multiple contacts with Respondents in this case sufficed to satisfy HUD's statutory duty to try to conciliate the complaint before issuing the formal Charge of Discrimination.[11]

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[11]It is also unclear from the *Baumgardner* decision how one may create a record sufficient to determine whether the Government made an "objectively reasonable effort" to conciliate without running afoul

The statute also requires HUD to complete its investigation of the complaint and make a reasonable cause determination within 100 days of the filing of the complaint. HUD did not do so. Nor did HUD notify the Respondents of the reasons the investigation and the reasonable cause determination were not completed by that deadline. When in *Baumgardner* it was shown that HUD had committed similar errors, the court applied a substantial prejudice test and concluded that the respondent had not been substantially prejudiced on the merits of the discrimination complaint but had been prejudices on the issue of damages. I reach the same conclusion here.

When Respondents were invited to explain how they were prejudiced by the Government's errors and delays, the only concrete response came from Respondent John Kelly. He maintained that he would have retained a lawyer sooner if the Determination of Probable Cause had been issued sooner. Tr.655. However, there is nothing in the record to suggest that the presentation of Respondent John Kelly's case would

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of Rule 408 of the Federal Rules of Evidence and 42 U.S.C. Sec. 3610 (d)(1). With a few exceptions not applicable here, Rule 408 prohibits introducing into evidence the contract of settlement negotiations or the conduct of the parties during settlement negotiations. Similarly, 42 U.S.C. Sec. 3610(d)(1) provides: "Nothing said or done in the course of conciliation under this title may be made public or used as evidence in a subsequent proceeding under this title without the written consent of the persons concerned."

have been stronger, or that the case could have been settled without trial, if counsel had been retained earlier. In short, Respondents did not demonstrate how they suffered any substantial prejudice in the preparation or presentation of their defense as a result of HUD's failure to follow its own rules and regulations.[12] Nevertheless, Respondents have been substantially prejudiced by the Government's conduct when it comes to the issue of damages.

Damages

Complainant requests on her own behalf economic damages of $10,432.73 and intangible damages of $15,000.00, totalling $25,532.73 *sic.* Intervenor's Brief at 29. The Government requests on Complainant's behalf an award of economic damages totalling $8,279.40 and intangible damages totalling $10,000.00. Secretary's Brief at 37, 39. She will be awarded economic damages of $6,930.76 and intangible damages of $3,500.00.

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[12]I have carefully considered all of the Respondents' allegations of misconduct by the Government's investigator and counsel and have found no substantial prejudice to Respondents' cause except as to damages, as discussed in the text. Furthermore, none of the liability findings in this decision depend on the credibility of HUD's investigator.

Economic Damages

Under Section 812(g)(3) of the Act (42 U.S.C Sec. 3612(g)(3)), Complainant is entitled to compensation for her out-of-pocket expenses resulting from Respondents' discrimination. But for that discrimination, Complainant could have rented the apartment at 6300 Montgomery Road sometime in March 1990. After she was turned away at 6300 Montgomery Road, she spent approximately 30 hours over six weeks' time searching for a comparable apartment before she found one at Kenwood Towers at a monthly rent of $425, $50 more per month than the rent would have been at 6300 Montgomery Road.[13] Expenses incurred in finding alternative housing and the difference in cost between the rent of a dwelling made unavailable by unlawful discrimination and the cost of more expensive alternative housing may be recovered, if the evidence shows that the expenses and the choice of alternative housing were reasonable. *Hamilton v. Svatik,* 779 F.2d 383, 388-89 (7th Cir. 1985) ($500 for additional rent and transportation expenses); *Young v. Parkland Village, Inc,* 460 F.Supp. 67, 71 (D.Md. 1978) ($88 in rent differential); *Brown v. Ballas,* 331 F.Supp. 1033 (N.D. Tex. 1971) (up to $750 for lost work and expenses in finding alternative housing).

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[13]Because Complainant was able to afford a $450 per month apartment, she was presumably economically qualified to rent one for $375 per month.

Complainant moved into the Kenwood Towers apartment during the latter part of April 1990. She continued to live there through the date of the hearing in late May 1992. Although the Kenwood Towers apartment is more expensive and has some arguably better features, I am satisfied that Complainant made a reasonable attempt to find an apartment comparable to one at 6300 Montgomery Road, and that the Kenwood Towers apartment was as close as she could get. She is therefore entitled to compensation for her increased alternative housing costs.

Complainant's unrebutted testimony indicates that she has been looking for an affordable apartment closer to her parents and her friends for more than a year and a half. Tr.364. As of the date of the trial, she had not been successful. She requests compensation for her more expensive alternative housing and associated transportation costs for a period of 27 months, the approximate period between March 5, 1990, when she suffered the discrimination, and the end of May 1992, when the trial began. In addition to the increased costs of alternative housing, victims of housing discrimination may also recover any increased transportation costs attributable to living in alternative housing, provided they show that they have attempted to minimize their

damages.[14] Damages accrue from the date the victim would have moved into the denied housing until the date of the hearing, or until the first date the complainant is no longer obligated to remain in the alternative housing and is free to occupy the denied housing, or the first date the complainant is able to occupy comparable housing at a comparable cost.[15] Under these rules, the record supports Complainant's claim for damages from the date she would have moved into 6300 Montgomery Road until the date of the hearing. But Complainant did not move into Kenwood Towers until late April 1990, and she cannot recover damages for higher rent she did not pay. She therefore will receive damages for increased alternative housing costs and associated transportation costs for the 25-month period from April 1990 to May 1992, even though much of this period is attributable to the Government's delay in bringing the case to trial.

Complainant paid $50 per month more for her apartment at Kenwood Towers than she would have paid if she had rented the apartment at 6300 Montgomery Road. She will receive an award of $1,250 for her higher alternative

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[14]*See Smith v. Anchor Building Corp.*, 536 F.2d 231, 234 n.4 (8th Cir. 1986); *Young v. Parkland Village*, 460 F. Supp. 67, 71 (D. Md. 1978).

[15]*See Miller v. Apts. and Homes of NJ.*, 646 F. 2d 101, 112 (3rd Cir. 1981); *Parkland Village*, 460 F. Supp at 71; *United States v. Keck*, 1990 US. Dist. LEXIS 19309 (W.D. Wash. Nov. 15, 1990).

housing costs over a period of 25 months.

As a consequence of living at Kenwood Towers rather than at 6300 Montgomery Road, complainant has been required to drive a total of 14 miles per day to and from the bus she rides to work which she would not otherwise have had to do. Over the period of 25 months, assuming the Federal mileage reimbursement rate of $.24 per mile, her increased commute transportation costs total $1,600.00 (70 miles/week x 4 weeks/month x 25 months x $.24 = $1,680.00). She will be awarded an additional $120.00 for miscellaneous travel expenses for 25 months.

Complainant's commute time has been 50 minutes longer each day than it would have been at 6300 Montgomery Road. Although she requests compensation for her additional commute time at the rate of $10.00 per hour and for the loss of leisure time at the rate of $20.00 per hour, her hourly wage of $8.17 per hour is the only objective evidence of the value of her time in the record, and she did not introduce any evidence to show that her leisure time should be valued more highly. For her additional commute time over 25 months, Complainant will be awarded $3,402.81 (.833 hours x 5 days/week x 4 weeks/month x 25 months x $8.17 = $3,402.81).

Complainants who are unlawfully dissuaded from

renting housing should receive compensation for the time and energy spent looking for alternative housing and prosecuting their cases.[16] Complainant spent approximately 30 hours over a six-week period looking for an apartment after her unsuccessful attempt to rent at 6300 Montgomery Road, and a total of 28.5 hours from March 1990 until the close of the hearing pursuing her claim against Respondents. Tr.200, 300, 313, 314. She will receive an award of $477.95 for that time (58.5 x $8.17 = $477.95).

Complainant's request for future damages of $1,733.33 must be denied because her future damages are

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[16]*See, e.g., HUD v. Blackwell* 2 Fair Housing-Fair Leading (P-H) ¶ 25,001 (HUDALJ Dec. 21,1989), *aff'd,* 908 F.2d 864 (11th Cir. 1990) (lost wages for time to consult with attorneys and to attend hearing on temporary restraining order and hearing before ALJ); *Hud v. Properties Unlimited,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,009 at 25,150 (HUDALJ Aug. 5, 1991) (complainant awarded costs for missing 4 days of work, including 2 days for hearing and 2 days for travel to and from hearing); *HUD v. Murphy,* 2 Fair Housing-Fair Lending (P-H) at 25,054 (complainant entitled to lost wages, babysitting fees, and travel expenses incurred to attend hearing). *But see Hodge v. Seiler,* 558 F.2d 284, 287 (5th Cir. 1977) (upheld trial court decision not to award airfare to and from trial but would not rule out such an award if appropriately made within broad discretion of trial judge, citing strong policies that lie behind remedial civil rights legislation, and the need to ensure that those who defend their rights are not financially penalized).

speculative and cannot be determined with reasonable specificity.

When Congress authorized administrative adjudication in 1988, it intended to provide a "speedy, fair, and inexpensive" procedure for resolving housing discrimination complaints.[17] Toward that end, the Act contains numerous time limitations. For example, HUD is required to complete its investigation and issue a reasonable cause determination within 100 days of the filing of the complaint; an administrative hearing must begin no later than 120 days after the issuance of a charge of discrimination; the decision of the administrative law judge is to be issued within 60 days after the end of the hearing; and the Secretary's discretionary review must be completed not later than 30 days after issuance of the decision.[18] Taken together, these time limitations indicate that Congress expected that a housing discrimination complaint brought before an administrative law judge would reach completion within less than a year after the filing of the complaint with HUD.

However, almost exactly two years elapsed from the

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[17]7134 Cong. Rec. H4608 (remarks of Rep. Edwards, the bill's chief sponsor in the House, describing the new administrative procedure).

[18]42 U.S.C. Secs. 3610, 3612. Most of the time limitations provide exceptions when it is "impracticable to abide by them".

date Complainant telephoned H.O.M.E. to complain that she was a victim of housing discrimination until the date HUD issued its Reasonable Cause Determination and Charge of Discrimination. By the time this decision becomes final, at least two and one-half years will have passed. There is no justification in the record for this delay, particularly the 17-month period between October 2, 1990, when HUD's investigator completed his investigation, and March 2, 1992, when the Reasonable Cause Determination and Charge of Discrimination was issued. Secretary's Motion of May 20, 1992, p.4. Clearly, in the instant case the parties have not been afforded the speedy resolution of the complaint required by the Act.

As a result of HUD's unexplained delay in bringing this case to trial, Respondents will suffer substantial prejudice, because they will be ordered to pay significantly higher damages than would have been ordered if this case had come to trial within a year. Complainant's demonstrated out-of-pocket damages for increased housing and transportation costs are nearly double what they would have been if the case had been tried within the period contemplated by the Congress.[19] However, a search of the Act, its legislative

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[19]If the accrual period for Complainant's damages were 12 months rather than 25 months, her economic damages would total $3,571.03, calculated as follows: higher alternative housing costs, $600; higher commute costs, $806.40; miscellaneous transportation costs, $53.33;

history, and the cases has revealed no authority for reducing the actual damages of a housing discrimination victim below the proven amount because HUD has, without explanation, delayed presenting the case for adjudication.

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commute time, $1,633.35; and time searching for alternative housing and pursuing claim, $477.95.

Intangible Damages

Actual damages in housing discrimination cases are not limited to out-of-pocket losses, but may also include damages for intangible injuries such as embarrassment, humiliation, and emotional distress caused by the discrimination.[20] Damages for emotional distress can be inferred from the circumstances, as well as established by testimony, even in the absence of evidence of economic or financial loss or medical evidence of mental or emotional impairment.[21] The amount of the award is intended to compensate the complainant for the damage inflicted by the discrimination. As in all civil cases, the damage award should make the victim whole.[22]

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[20]*See, e.g. HUD v. Blackwell,* Fair Housing-Fair Lending (P-H), ¶ 25,001 at 25,011 (HUDALJ Dec. 21, 1989), *aff'd* 908 F.2d 864 (11th Cir. 1990); *See also Smith v. Anchor Bldg. Corp.,* 536 F.2d 231 (8th Cir. 1976); *Steele v. Title Realty Co.,* 478 F.2d 380, 384 (10th Cir. 1973).

[21]*See, e.g., Seaton v. Sky Realty,* 491 F.2d 634, 636 (7th Cir. 1974); *Smith v. Anchor Building Corp.,* 536 F.2d 231, 236 (8th Cir. 1976) (damages for emotional distress may be awarded, even though any award for out-of-pocket damages is limited); *Johnson v. Hale,* 940 F.2d 1192 (9th Cir. 1991); *HUD ex rel. Herron v. Blackwell,* 908 F.2d 864, 874 (11th Cir. 1990).

[22]*See, e.g., HUD v. Blackwell,* 2 Fair Housing-Fair Lending (P-H) ¶q 25,001, 25,013 (HUDALJ Dec. 21,1989) *aff'd,* 908 F.2d 864, 872-73 (11th Cir. 1990) (amount of damages awarded should

Housing discriminators must take their victims as they find them; that is, damages are measured based on the injuries actually suffered by the victim, not on the injuries that would have been suffered by a reasonable or by an ordinary person.[23] Put otherwise, the susceptibility of the victim to injury is a factor that must be taken into consideration.[24] Complainant testified to the effect that as an

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compensate for the injury suffered so as to make the injured party whole, and should not provide the injured party with a windfall). *See also Rogers v. Loether*, 467 F.2d 1110, 1122 (7th Cir. 1972), *aff'd sub nom., Curtis v. Loether*, 415 U.S. 189 (1974) ("The payment of compensatory damages in a housing discrimination case, however, is not a return to plaintiff of something which defendant illegally obtained or retained; it is a payment in money for those losses—tangible and intangible—which plaintiff has suffered by reason of a breach of duty by defendant.")

[23]*See, e.g., HUD v. Properties Unlimited*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,009, 25,152 (HUDALJ Aug. 5,1991) (damage award gave consideration to fact that complainant was eight and one-half months pregnant at time of discriminatory act); *HUD v. Jerrard*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,,005, 25,091 (HUDALJ Sept. 28, 1990) (complainant's "pre-existing emotional problem taken into consideration in determining damages for emotional distress).

[24]*See Baumgardner v. HUD*, 960 F.2d 572, 581 (6th Cir. 1992), where the cost affirmed an award by an ALJ of $500 for emotional distress, noting that complainant "did not appear to the ALJ to be 'a man of vulnerable constitution who could be easily driven to distress'. He felt hurt and angry, but 'it was kind of easy to get over.'" However, the *Baumgardner* court rejected, without explanation, a claim that the complainant's emotional distress award should be augmented because

African-American, she has become sensitized to discrimination because she has experienced discrimination based on her race. Tr.291-93. When asked to compare past experiences of racial discrimination with the discrimination she suffered in this case, she said, "this stands out much more in my mind because it affected innocent children that had no cause to be discriminated against." Tr.296.

As a young single woman with relatively low income who is responsible for raising two children, Complainant is precisely the kind of vulnerable person the Act was designed to protect. When she was turned away from 6300 Montgomery Road, she was forced to continue living for several weeks in stressful, crowded conditions with her parents, sleeping five people to a room. While looking for alternative housing, she continued to worry that she might run

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he had previously experienced racial discrimination. 960 F.2d at 581. Because the court affirmed the emotional distress award based on an assessment of the complaint's vulnerability, I have not interpreted the decision to reject the principle that the susceptibility of a housing discrimination victim to injury must be considered. *See also Steele v. Title Realty,* 478 F.2d 380 (10 Cir. 1973) (previous discrimination relevant to determining amount of compensation for emotional distress): *David v. Mansards,* 597 F.Supp. 334, 347-48 (N.D. Ind. 1984) (wife-tester, "deeply affected" and "decimated emotionally," was awarded $5,000, while husband-tester, who was "much less profoundly affected" and displayed a "degree of cynicism", was awarded $2,500); *Harrsons v. Otto G. Heizeroth Mfg. Co.,* 430 F.Supp. 893, 897 (ND. Ohio 1977).

into another landlord who would treat her the same way. Tr.297. Although her distress subsided over the months following her telephone call to Michael P. Kelly Realty, she said at hearing that she continued to feel the effects of the discrimination. Tr.298.

Complainant was particularly troubled by the location of Kenwood Towers and the absence of recreational facilities for her children:

> It comes to mind a lot because where I live is not accessible to transportation. When I'm stuck in a house where there's nowhere for my children to play, to have to, you know, I feel bad about that. There's times where I need things and I can't just get up and walk to a store.

Tr.298. She felt that not having transportation on the weekends had a "very adverse effect" on her life. Tr.310. "I mean, it's just depressing to sit at home all the time on the weekend, but I don't have a choice." Tr.311. There have been occasions when she has been unable to get supplies, including medicine, for her daughters because she has been without transportation and there are no 24-hour convenience stores near Kenwood Towers as there are near 6300 Montgomery Road. Tr.311-12. Complainant should be compensated for her "lost housing opportunity," that is, the

deprivation of those features of 6300 Montgomery Road that are of particular and uncommon value to her but are not reflected in the rental market values of 6300 Montgomery Road and Kenwood Towers.[25]

Although Complainant's intangible injuries are substantial, they are not extreme. More offended than humiliated or depressed by the discrimination she experienced, she apparently has not felt the need for professional care or medication to cope with her distress. Her testimony was straightforward, self-possessed, and presented with little emotional display, leaving the impression that she is a resourceful and resilient person who will not suffer any long-term emotional scars from this episode. Considering the record as a whole, I conclude that an award of $3,500.00 will adequately compensate Complainant for her emotional distress and loss of housing opportunity.

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[25] *HUD v. Wagner*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,032 (HUDALJ June 22, 1992) ($350 awarded for deprivation of features of denied housing particularly valued by complainant); *HUD* v. *Holiday Manor Estates Club*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,016, 25,232 (HUDALJ Nov. 26, 1991), *recons'd on other grounds* ¶ 25,025 (Feb. 21, 1992), *aff'd on other grounds* ¶ 25,027 (HUD Office of the Sec'y Mar. 23, 1992) ($500 awarded for lost housing opportunity because complainant was denied home located near her parents that would have allowed her to escape abusive husband).

Civil Penalties

To vindicate the public interest, the Act authorizes an administrative law judge to impose civil penalties upon respondents who violate the Act. 42 U.S.C. Sec. 3612 (g)(3); 24 C.F.R. Sec. 104.910(g)(3). The Government requests imposition of civil penalties in the amount of $10,000 against Respondents. The legislative history of the 1988 Fair Housing Amendments Act includes these comments about civil penalties:

> The Committee intends that these civil penalties are maximum, not minimum, penalties, and are not automatic in every case. When determining the amount of a penalty against respondent, the ALJ should consider the nature and circumstances of the violation, the degree of culpability, and any history of prior violations, the financial circumstances of that respondent and the goal of deterrence, and other matters as justice may require.

H. Rep. No. 711, 100th Cong., 2d Sess. at 37 (1988). Respondents have no history of housing discrimination violations. In fact, they testified that they made anonymous telephone calls to H.O.M.E. before the Act was amended in 1988 in an attempt to determine occupancy standards for 6300 Montgomery Road. Although Respondents may be faulted

for their failure to ask the right questions from authoritative sources, their attempt to conform their rental business with the requirements of the law manifests good intentions. Consistent with those demonstrated good intentions, Complainant appears to have been treated politely and without malice when she called Michael P. Kelly Realty to inquire about an apartment. Nevertheless, Respondents and other similarly situated housing providers need to be deterred from engaging in discriminatory treatment of families with children. They must come to understand that landlords cannot delegate their duty to prevent housing discrimination, and that they may be guilty of unlawful discrimination even if they do not exclude all children from their rental properties. If an apartment may be rented to two adults and one child, then that same apartment must be made available to one adult and two children.

Only the goal of deterrence argues for imposition of a civil penalty in this case. Under ordinary circumstances, the civil penalty imposed for that single purpose would be less than $3,000. However, the circumstances are extraordinary in this case, in that HUD has failed by a very wide margin to observe the time limitations in the Act and the regulations, more than doubling the accrual period of Complainant's damages. In consequence, Respondents will be ordered to pay economic damages more than $3,000 higher than they would have been if HUD had presented the case for

adjudication within the period contemplated by the Act. In the *Baumgardner* case, the Sixth Circuit Court of Appeals reduced a $4,000 civil penalty that had been imposed by an administrative law judge to $1,500 because HUD had failed to properly observe its own rules and regulations. The court held that such deficiencies, while not a denial of due process, "do have an adverse effect with regard to ascertaining fair and reasonable damages..."[26] In light of the *Baumgardner* ruling,

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[26]The *Baumgardner* decision appears to confuse civil penalties with punitive damages. For example, at the beginning of the discussion regarding damages, the decision states: "Title 42 U.S.C. Sec. 3613 authorizes 'actual and punitive' damages as well as injunctive relief". 960 F.2d at 580. However, this section does not apply to administrative proceedings; rather it authorizes United States district courts and State courts to award actual and punitive damages to plaintiffs in civil actions. *Cf.* 42 U.S.C. Sec. 3612. Further, a subsection of the discussion is entitled, "Civil Penalty-Punitive Damages," and concludes:

> We entertain a clear conviction in this case, based upon all the circumstances in the record, that an award in excess of the allowed compensatory damages of $1,5000 for a civil penalty would be excessive, unjust, and improper. We, therefore, adjust the civil penalty damage award to $1,500. Total damages, therefore, are determined to be $3,000.

960 F.2d at 583. In other words, the text of the decision combines the civil penalty with the compensatory award and speaks of both as "damages". However, the order of the court does not change the payee of the civil penalty (i.e. HUD); it only changes the size of the penalty

I decline to impose a civil penalty in this case.

Injunctive Relief

An administrative law judge may order injunctive or other equitable relief to make a complainant whole and protect the public interest in fair housing.[27] 42 U.S.C. Sec. 3612(g)(3). The purposes of injunctive relief included: eliminating the effects of the past discrimination, preventing future discrimination, and positioning the aggrieved persons as close as possible to the situation they would have been in, but for the discrimination. *See Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033, 1036 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980). Once a judge has determined that discrimination has occurred, he or she has "the power as well as the duty to 'use any available remedy to make good the wrong done.'" *Moore v. Townsend*, 525 F.2d 482, 485 (7th Cir. 1985) (citations omitted). The injunctive provisions

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imposed by the ALJ. Therefore, reading the order of the court together with the decision shows that the court indeed separated the civil penalty from the compensatory damage award, and that the court did not intend respondent to pay complainant $3,000 in damages.

[27]Injunctive relief should be structured to achieve the twin goals of insuring that the Act is not violated in the future and removing any lingering effects of past discrimination." *HUD v. Blackwell*, 908 F.2d 864, 875 (11th Cir. 1990)(quoting *Marable v. Walker*, 704 F.2d 1219, 1221 (11th Cir. 1983)).

of the following Order serve all of these purposes.

Order

It is hereby ORDERED that:

1. Respondents are permanently enjoined from discriminating against Complainant, any member of her family, and any tenant or prospective tenant, with respect to housing because of familial status, and from retaliating against or otherwise harassing Complainant or any member of her family. Prohibited actions include, but are not limited to, all those enumerated in the regulations codified at 24 C.F.R. Part 100 (1991).

2. Respondents and their agents and employees shall cease employing any policies or practices that discriminate against families "with children", including any policy that prohibits or discourages people with children 18 years or younger from living in any residential rental real estate owned or operated by Respondents. Specifically, Respondents and their agents and employees shall cease telling prospective tenants that no more than one child may live in a two-bedroom apartment at 6300 Montgomery Road, Cincinnati, Ohio.

3. Consistent with 24 C.F.R. Part 109, Respondents shall display the HUD fair housing logo and slogan in all advertising and documents routinely provided to the public. Consistent with 24 C.F.R. Part 110, Respondents shall display

the HUD fair housing poster in a prominent place in a common area at 6300 Montgomery Road, Cincinnati, Ohio, and in any rental office where Respondents, either singly or together, conduct a housing rental business.

4. Respondents shall institute internal recordkeeping procedures with respect to the operation of 6300 Montgomery Road and any other real properties owned or managed or acquired by Respondents adequate to comply with the requirements set forth in this Order. Respondents will permit representatives of HUD to inspect and copy all pertinent records at any and all reasonable times and upon reasonable notice. Such representatives of HUD shall endeavor to minimize any inconvenience to Respondents from the inspection of such records.

5. On the last day of each sixth month period beginning February, 1993, and continuing for three years from the date this Order becomes final, Respondents shall submit reports containing the following information to HUD's Chicago Regional Office of Fair Housing and Equal Opportunity, 626 West Jackson Boulevard, Chicago, Illinois 60606-6765:

a. A log of all persons who applied for occupancy at 6300 Montgomery Road during the six-month period preceding the report, indicating the name and

address of each applicant, the number of persons to reside in the unit, the number of bedrooms in the unit for which the applicant applied, whether the applicant was rejected or accepted, the date on which the applicant was notified of acceptance or rejection, and if rejected, the reason for such rejection.

b. A list of vacancies during the reporting period at 6300 Montgomery Road, including: the address of the unit, the number of bedrooms in the unit, the date Respondents were notified that the tenant would or did move out, the date the tenant moved out, the date the unit was rented again or committed to a new rental, and the date the new tenant moved in.

c. A list of all people who inquired, in writing, in person, or by telephone, about the rental of an apartment, including their names and addresses, the date of their inquiry, and the disposition of their inquiry.

d. A list of all tenants upon whom Respondents served a termination of tenancy notice, including the tenant's name, apartment number and address, date of such service, a statement of each reason for the termination notice and whether the tenant terminated the tenancy and the date of such termination.

e. A description of any changes in rules, regulations, leases, or other documents provided to or signed by current or new tenants or applicants (regardless of whether the change was formal or informal, written or unwritten) made during the reporting period, and a statement of when the change was made, how and when tenants and applicants were notified of the change, whether the change or notice thereof was made in writing, and, if so, a copy of the change or notice.

6. Within ten days of the date on which this Order becomes final, Respondents shall pay actual damages to Complainant Dionne Staples of $10,430.76.

7. Within ten days of the date this Order becomes final, Respondents shall inform all their agents and employees in the business of renting housing of the terms of this Order and educate them as to such terms and the requirements of the Fair Housing Act. All new employees shall be informed of such no later than the evening of their first day of employment.

8. Respondents shall submit a written report to this tribunal within 15 days of the date this Order becomes final detailing the steps taken to comply with this Order.

9. Respondents' Request for Acceptance of their Reply Memorandum of August 1, 1992, is granted.

This Order is entered pursuant to 42 U.S.C Section 3612 (g)(3) of the Fair Housing Act and the regulations codified at 24 CF.R. Section 104.910, and will become final upon the expiration of thirty (30) days or the affirmance, in whole or in part, by the Secretary within that time.

/s/ Thomas C. Heinz
THOMAS C. HEINZ
Administrative Law Judge

Dated: August 26, 1992.

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DECISION AND ORDER issued by THOMAS C. HEINZ, Administrative Law Judge, in HUDALJ 05-90-0879-1, were sent to the following parties on this 26th day of August, 1992, in the manner indicated:

/s/ Janet H. Ronamba
Chief Docket Clerk

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APPENDIX D

UNITED STATES COURT OF APPEALS
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT

OFFICE OF AMINISTRATIVE LAW JUDGES

INITIAL DECISION ON REMAND

HUDALJ No. 90-0879-1
Decided Decmeber 1, 1994

D87 thru D108

APPENDIX D

APPENDIX D

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Office of Administrative Law Judges

The Secretary, United States Department of Housing and Urban Development, on behalf of Dionne Staples, *Charging Party,* v. Michael P. Kelly and John T. Kelly, *Respondents.*	HUDALJ 05-90-0879-1 Decided: Dec. 1, 1994

Robert G. Kelly, Esquire
For the Respondents

Frederick M. Morgan, Jr., Esquire
For the Intervenor

Kathleen M. Pennington, Esquire
For Charging Party

Before: Thomas C. Heinz, *Administrative Law Judge*

INITIAL DECISION ON REMAND

On August 26, 1992, I issued a decision in this case concluding that Respondents violated §§ 804(a), (b), and (c) of the Fair Housing Act as amended (42 U.S.C. §§ 3604 (a), (b), and (c)). The decision awarded damages of $10,430.76 to Complainant Dionne Staples, enjoined Respondents from future violations of the Act, imposed several recordkeeping requirements, but declined to impose any civil penalties because the damages had been increased by HUD's "unexplained delays" in processing the Case. *HUD v. Kelly*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,034, 25,363 (HUD A.L.J. Aug. 26, 1992). Respondents appealed the decision to the United States Court of Appeals for the Sixth Circuit, which issued its decision on August 27, 1993, in *Kelly v. HUD*, 3 F.3d 951 (6th Cir. 1993). The Court of Appeals affirmed the liability findings and injunctive provisions of the decision below, vacated the damages award, and remanded the case to the Secretary:

> for the purpose of conducting conciliation with a qualified conciliator other than Charles Jung, who has had no previous contact with this case. If conciliation fails, the case will be resumed to the ALJ for reconsideration and such further proceedings as may be required in light of this opinion; but in no case should damages be assessed for the period during which HUD completely neglected this case.

3 F.3d 957-58.

I have been informed by letter dated July 18, 1994, from the Secretary's Assistant General Counsel of the Midwest that the additional conciliation efforts required by the Court have failed, leaving the parties at an impasse. The damages issue must therefore be reconsidered.

The original decision ordered Respondents to pay Complainant a total of $10,430.76 as compensation for the damages she suffered in six separate categories: $1,250 for the cost of more expensive alterative housing; $1,680 for higher commuting costs to and from work; $120 for miscellaneous travel expenses; $3,402.81 for additional commute time; $477.95 for time spent looking for alternative housing and prosecuting the case; and $3,500 for emotional distress and lost housing opportunity. *Kelly*, 2 Fair Housing-Fair Lending at 25,365. Complainant's tangible damages began in late April 1990 when she moved into alternative housing as a result of the discrimination she had suffered, and ended 25 months later with the trial. *Id.* at 25,360. Out of damages totalling $10,430.76, only $6,452.81 is at issue on remand because the remainder was not calculated using an accrual period.[1]

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[1]Complainant's awards for additional distress and lost housing opportunity ($3,500) and for time spent looking for alternative housing and pursuing her claim ($477.95) was not based on an accrual period.

The Sixth Circuit Court vacated the damages award so that the case could be conciliated for the second time, not because the Court found that the award was unsupported by substantial evidence. Now that HUD's conciliation efforts have failed again, I have reconsidered the damages award in the original decision and have concluded, based on the evidence of record, that the damages award remains justified for the reasons stated in the original decision. However, the Court, anticipating that conciliation might again fail, ordered that upon reconsideration "in no case should damages be assessed for the period during which HUD completely neglected this case." 3 F.3d at 958.

In the face of the Court's order, the Charging Party and the Intervenor argue on remand that the *Kelly* decision is inconsistent with Supreme Court precedent, Ninth Circuit case law, the language and purpose of the Act, and analogous case law under Title VII. These are appropriate arguments to pose in an appellate court, but not in this forum in this case, because I am constrained to follow the dictates of the *Kelly* decision. *See Sullivan v. Hudson*, 490 U.S. 877, 886 (1989) (deviation from the appellate courts remand order in subsequent administrative proceedings is itself legal error, subject to reversal on further judicial review); *In re Wella A. G.*, 858 F.2d 725, 728-29 (Fed. Cir. 1988); *Mefford v. Gardner*, 383 F.2d 748, 758-59 (6th Cir. 1967).

Although the Sixth Circuit Court did not expressly identify "the period during which HUD completely neglected this case," and the original decision included no finding that HUD had "completely neglected" the case for any period, the Court must be deemed to have reached its conclusion based on a review of the evidence in the record before it at the time of its decision. Because I am not free to reach a contrary conclusion, I must attempt to determine the period of complete neglect that the Court perceived when it issued its decision.

The offending period must lie within the 655-day period between the date Complainant filed her complaint with HUD and the date HUD issued the Charge of Discrimination ("Charge"), because the Court found no fault with HUD's handling of the case during any other period. Section 3610 of the Act requires HUD to complete the investigation of a housing discrimination complaint, attempt to conciliate the complaint, make a reasonable cause determination of the merits of the complaint, and, where the evidence warrants, issue the Charge within 100 days of the filing of the complaint, "unless it is impracticable to do so." 42 U.S.C. § 3610. Complainant Dionne Staples filed her complaint with HUD on May 17, 1990. The investigation and efforts to conciliate the complaint concluded on October 2, 1990, 138 days after she filed her complaint. Seventeen months (517

days) later, on March 2, 1992, HUD issued the Charge.[2] Because the Court concluded that "these delays were inexcusable," the decision could be interpreted to hold that with respect to the 655-day period between the filing of the complaint and HUD's issuance of the Charge, Complainant's damages cannot accrue for more than the first 100 days. 3 F.3d at 958. For several reasons, I decline to adopt that interpretation.

Damages Accrue Beyond 100th Day After Complaint Filed

If the Court had intended to limit the accrual period for damages to 100 days--a simple proposition--it could have easily said so. Instead, the Court announced the "completely neglected" standard. Further, if the Court intended to limit the accrual of damages to the first 100 days after Complainant filed her complaint with HUD, it necessarily follows that the Court had the remaining 555 days in mind when it referred to "the period during which HUD completely neglected this case" (given that the offending period must lie within the 655-day period at issue on remand). But the record clearly shows that during those 555 days, HUD completed the

[2]Section 3612(g) of the Act (42 U.S.C. § 3612(g)) requires the ALJ to commence the hearing "no later than 120 days following the issuance of the charge, unless it is impracticable to do so." In this case the trial began on May 27, 1992, 86 days after issuance of the Charge.

investigation, made a reasonable cause determination, and filed the Charge. That obviously does not constitute a period of complete neglect.

Moreover, a strict 100-day limitation for the accrual of damages in this case would contravene HUD's regulatory interpretation of the Fair Housing Act, first published in 1989. The statute requires HUD to comply with the 100- day limit "unless it is impracticable to do so." Although Congress did not define "impracticable," HUD's interpretation of that provision may be found in the Preamble to the regulations implementing the Fair Housing Amendments Act of 1988. The Preamble addresses comments filed with the Department after publication of the proposed regulations. It states in part:

> Other commenters argued that the regulation must clearly identify the circumstances under which it will be impracticable to complete the investigation or issue a reasonable cause determination within the 100-day period. These commenters suggested that impracticability be defined as extraordinary circumstances in the specific case and that the rule should state that the routine processing of other cases will not be grounds for a finding of impracticability. The range of circumstances that could legitimately cause delay in a case is numerous *[sic],* and HUD is not prepared to identify all possible circumstances that would make it "impracticable" to take the described actions within the prescribed time period. Moreover, even if HUD were to articulate all such

> circumstances, it would not preclude the consideration of the demands upon HUD's resources caused by other docketed cases. Such a definition would fail to recognize that even the best-managed case inventory system may not possess the excess capacity to respond to extraordinary demands upon resources.

24 C.F.R. Subtitle B, Ch.I, Subch.A, App.I (1994), page 900. In other words, in 1989 HUD construed "impracticable" to include, among other things, circumstances where faster processing is precluded by the complexity of the particular case at hand as well as situations where the size of the overall caseload prevents processing within the 100-day limit. The Charging Party asserts on remand that a large caseload precluded HUD from processing this case any faster than it did. HUD's regulatory interpretation of the Act "commands considerable deference" because HUD has the primary responsibility for implementing and administering the Act. *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 107 (1979). As the Supreme Court has explained:

> [Once a] court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agencies answer is based on a permissible construction of the statute.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)(footnotes omitted).

HUD's regulatory interpretation of "impracticable" appears reasonable and permitted by the statute. Imposing a strict 100-day limit for the accrual of Complainant's damages in this case would contravene that interpretation. *See* "Charging Party's Memorandum Pursuant to the Administrative Law Judge's August 16, 1994 Order," pp. 15-17. As the Sixth Circuit Court has not explicitly rejected HUD's interpretation of "impracticable" as set out in the Preamble to the regulations, I decline to adopt an interpretation of the Court's decision that would have that effect.

Furthermore, whether or not it was "impracticable" for HUD to process this case faster was not litigated in the trial below. No evidence was introduced on the issue, the parties did not brief the question, and I made no findings on the point.[3] I found that HUD's delays were "unexplained."

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[3]The issue apparently was not litigated in the Circuit Court either. According to the Intervenor, the parties did not brief the question whether the victim of a civil rights violation must suffer a reduction in proven compensatory damages if the Government committed procedural errors during the period preceding the issuance of the Government's complaint. *See* "Response of Intervenor, Dionne Staples, to the Court's August Briefing Order," p.2.

Consistent with the *Sixth* Circuit Court's decision in *Baumgardner v. HUD ex rel Holley,* 960 F.2d 572 (6th Cir. 1992), the question at trial was whether Respondents were "substantially prejudiced" by HUD's delays, not whether faster processing was "impracticable."

The Sixth Circuit Court has not ruled that a complainant in a Fair Housing Act case will suffer a reduction in compensatory damages if the charging party does not submit evidence to justify a case-processing period that goes beyond 100 days. The remand in *Kelly* was not predicated on a failure of proof, and in the *Baumgardner* decision the Court stated that "an implied 'good cause' basis exists for extending the investigation beyond 100 days." *Id.* at 578. Moreover, the Court in *Baumgardner* did not reduce the compensatory damage award on the ground that HUD had impermissibly delayed presenting the case for adjudication, even though 497 days elapsed from the filing of the complaint until the trial in that case. Instead, citing HUD's "mismanagement of the complaint," the *Baumgardner* Court reduced the civil penalties that had been imposed by the ALJ *Id.* at 583.[4] The compensatory damages that had been awarded by the ALJ were reduced by the Court for want of evidentiary or legal

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[4]In the original decision in the instant case I found that HUD's delays had increased Complainant's compensatory damages, causing substantial prejudice to Respondents. In light of *Baumgardner,* I imposed no civil penalties. HUD v. *Kelly,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,034,25,363 (HUD A.L.J. Aug. 26, 1992).

support, not because HUD's mismanagement had caused the damages to accrue for too long a period. *Id.* at 580-83.[5]

If the damages suffered by the Complainant in the instant case during the 655 days that elapsed from the date she filed her complaint until the Charge was filed must be limited to those damages that accrued during the first 100 days, then her damages would accrue over a total of only seven months rather than the 25 months determined in the original decision (655 days-100 days = 555 days = 18 months - 25 months = 7 months). *HUD v. Kelly, 2* Fair Housing-Fair Lending (P-H) ¶ 25,034, 25,361 (HUD A.L.J. Aug. 26, 1992). The portion of her award at issue here would then have to be reduced by 72 percent of $6,452.81 to $1,806.77 ($6,452.81/25 months = $258.11/month x 7 months = $1,806.77). Absent clear instructions from the Court, I decline to adopt an interpretation of the Court's decision that would deprive

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[5]The *Kelly* Court appears to have been under the misapprehension that HUD personnel involved in processing that case had willfully ignored the Court's guidance as set out in *Baumgardner*. Citing its earlier decision, the Court in *Kelly* stated that it was "surprised and distressed to have another Fair Housing Act case from Cincinnati in which HUD has ignored time requirements.... Apparently the Cincinnati office of HUD just doesn't get it." 960 F.2d at 954-955. It should be noted that the Charge of Discrimination in *Kelly* was issued on March 2, 1992, and the *Baumgardner* decision was handed down nearly a month later, on March 31, 1992. The HUD personnel who processed the instant case up to the filing of the Charge could not benefit from lessons contained in the *Baumgardner* decision before that decision was issued.

Complainant of more than $4,600 in actual, proven, tangible damages. The Court has affirmed the conclusion in the original decision that Complainant was victimized by Respondents. If the Court's decision is interpreted to preclude accrual of damages for more than 100 days after Complainant filed her complaint, then the Complainant will be victimized twice, first by the Respondents, the second time by government officials charged with vindicating and protecting her rights. Furthermore, such an interpretation would hand Respondents a windfall. They have already escaped imposition of a civil penalty of approximately $3,000 because of HUD's processing delays. *Id.* 25,363. They should not reap an additional benefit of more than $4,600 based on those same delays. I therefore conclude that the Sixth Circuit Court did not intend to limit the accrual of Complainant's damages to the first 100 out of the 655 days it took HUD to present the case for adjudication.

Period of Complete Neglect Cannot Be Identified

What limitation, then, did the Court have in mind? Because the decision did not specify the offending period, I ordered the parties on August 16, 1994, to "[i]dentify, with citations to the record, the beginning and ending dates of the period(s) during which HUD 'completely neglected' the case initiated by Complainant Staples. In response, the Charging Party and the Intervenor contended that the case was never

completely neglected, while the Respondents argued "that the case was completely neglected by HUD from the date of its filing through and including this date." "Response of Michael P. Kelly and John T. Kelly to Court Order Dated August 16, 1994," p.2. It is obvious, of course, that HUD has not completely neglected this case from its beginning; this litigation would not have occurred if it had. It is likewise obvious that HUD did not completely neglect the case for the entire 655-day period at issue on remand. During that time, HUD conducted an investigation, attempted to conciliate the complaint, made a reasonable cause determination, and filed the Charge. After a careful reexamination of the record reviewed by the Sixth Circuit Court of Appeals, I am unable to identify any specific period during which HUD "completely neglected" this case.

The Charging Party has submitted several affidavits from HUD officials responsible for processing housing discrimination complaints. The purpose of this evidence is to demonstrate that, contrary to the conclusion of the Court, there was never a period during which HUD "completely neglected" this case. The affidavits have become a part of the record because Respondents did not object to their admission, but I decline to evaluate them.[6] To be sure, the Court

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[6]These affidavits address an issue fraught with danger. Opening the door to litigation on the question of whether or not faster case processing was "impracticable" would have unavoidable and untoward

directed that on remand I should conduct such further proceedings as may be required in light of this opinion," but the Court cannot possibly have intended that I should re-open the record to receive and evaluate evidence submitted for the purpose of proving or disproving conclusions that the Court has already reached. The Court has unequivocally concluded that "HUD completely neglected this case" for an unidentified period, and that HUD's "delays were inexcusable." 3 F.3d at 957-58. These conclusions cannot be rebutted on remand.

In sum, the *Kelly* decision does not identify the period when HUD "completely neglected this case," the parties did not identify the offending period upon request, and I have been unable to do so. Although Complainant's damages award must be reduced to comply with the order of the Court, I conclude that under these circumstances the award should be reduced only a nominal amount. Therefore, the portion of the damages award at issue on remand will be reduced by 51 to

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consequences. Judges would be asked to decide whether a case was "simple" or complex"; whether HUD indeed had a case "overload" as claimed; whether staffing was adequate for the number of cases handled; whether supervision was proper; whether personnel were competent; whether priorities were probably set; and whether the Congress made responsible budgetary decisions that provided sufficient funds to HUD for the proper administration and enforcement of the Fair Housing Act. In my judgment, these kinds of issues should be excluded from the judicial forum as much as possible. Otherwise, judges will become entangled in the micromanagement of executive agency affairs.

$6,451.81.

Award of Additional Damages on Remand Inappropriate

On remand the Charging Party and the Intervenor request augmentation of Complainant's earlier damages award to reflect additional damages she allegedly suffered after the trial. However, the decision in *Kelly* cannot be fairly read to contemplate an increase in the damages award. Quite the contrary: the Court clearly intended that the damages award would be reduced on remand. In other words, the request to augment Complainant's damages award falls outside the scope of the Court's remand order.

Furthermore, increasing the damages award on remand would penalize Respondents for appealing an unfavorable decision. Unless Respondents were clearly on notice that they ran the risk of paying a higher damages award if they failed to win a total reversal of the case on appeal, they should not suffer a penalty for exercising their appeal rights. Respondents cannot be found to have had the requisite notice when they appealed the original decision, inasmuch as the Charging Party and the Intervenor cite no law under the Fair Housing Act for the proposition that damages may continue to accrue against a respondent during appellate litigation. Accordingly, the request by the Charging Party and the Intervenor to augment Complainant's damages award to

reflect additional damages allegedly suffered after trial will be denied.

Interest on Damages Award Appropriate

The Charging Party and the Intervenor also request an award of interest on Complainant's damages award. The Sixth Circuit Court has held that the purpose of a compensatory damage award in a civil rights case is to "make the claimant whole, that is, to place him in the position he would have been in but for discrimination." *Racimas v. Michigan Department of Mental Health,* 714 F.2d 614, 626 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984). While the parties have been engaged in appellate litigation, inflation has undermined the value of Complainant's damages award. Interest on that award will restore its value as of the date of the final decision in 1992, and when paid, will help make Complainant whole. Because this proceeding is the administrative corollary of a Fair Housing Act proceeding in a United States district court, the requested interest will be awarded according to the terms and conditions of 28 U.S.C. § 1961, which governs the award of interest on money judgments recovered in civil cases in district courts.

Suggested Reassignment of Case

Respondents suggest "that this case should be reassigned or that Judge Heinz should recuse himself." "Response of Michael P. Kelly and John T. Kelly to Court Order Dated August 16, 1994," p. 8. Respondents cite no reason to support this suggestion, and there is none.

ORDER

It is hereby ORDERED that:

1. Respondents are permanently enjoined from discriminating against Complainant, any member of her family, and any tenant or prospective tenant, with respect to housing because of familial status, and from retaliating against or otherwise harassing Complainant or any member of her family. Prohibited actions include, but are not limited to, all those enumerated in the regulations codified at 24 C.F.R. Part 100 (1991).

2. Respondents and their agents and employees shall cease employing any policies or practices that discriminate against families with children, including any policy that prohibits or discourages people with children 18 years or younger from living in any residential rental real estate owned or operated by Respondents. Specifically, Respondents and

their agents and employees shall cease telling prospective tenants that no more than one child may live tn a two-bedroom apartment at 6300 Montgomery Road, Cincinnati, Ohio.

3. Consistent with 24 C.F.R. Part 109, Respondents shall display the HUD fair housing logo and slogan in all advertising and documents routinely provided to the public. Consistent with 24 C.F.R. Part 110, Respondents shall display the HUD fair housing poster in a prominent place in a common area at 6300 Montgomery Road, Cincinnati, Ohio, and in any rental office where Respondents, either singly or together, conduct a housing rental business.

4. Respondents shall institute internal recordkeeping procedures with respect to the operation of 6300 Montgomery Road and any other real properties owned or managed or acquired by Respondents adequate to comply with the requirements set forth in this Order. Respondents will permit representatives of HUD to inspect and copy all pertinent records at any and all reasonable times and upon reasonable notice. Such representatives of HUD shall endeavor to minimize any inconvenience to Respondents from the inspection of such records.

5. On the last day of each six-month period beginning January 1, 1995, and continuing for three years from the date

this Order becomes final, Respondents shall submit reports containing the following information to HUD's Chicago Regional Office of Fair Housing and Equal Opportunity, 626 West Jackson Boulevard, Chicago, Illinois 60606-6765:

a. A log of all persons who applied for occupancy at 6300 Montgomery Road during the six-month period preceding the report, indicating the name and address of each applicant, the number of persons to reside in the unit, the number of bedrooms in the unit for which the applicant applied, whether the applicant was rejected or accepted, the date on which the applicant was notified of acceptance or rejection, and if rejected, the reason for such rejection.

b. A list of vacancies during the reporting period at 6300 Montgomery Road, including: the address of the unit, the number of bedrooms in the unit, the date Respondents were notified that the tenant would or did move out, the date the tenant moved out, the date the unit was rented again or committed to a new rental, and the date the new tenant moved in.

c. A list of all people who inquired, in writing, in person, or by telephone, about the rental of an apartment, including their names and addresses, the date of their inquiry, and the disposition of their

inquiry.

d. A list of all tenants upon whom Respondents served a termination of tenancy notice, including the tenant's name, apartment number and address, date of such service, a statement of each reason for the termination notice and whether the tenant terminated the tenancy and the date of such termination.

e. A description of any changes in rules, regulations, leases, or other documents provided to or signed by current or new tenants or applicants (regardless of whether the change was formal or informal, written or unwritten) made during the reporting period, and a statement of when the change was made, how and when tenants and applicants were notified of the change, whether the change or notice thereof was made in writing, and, if so, a copy of the change or notice.

6. Within ten days of the date on which this Order becomes final, Respondents shall pay actual damages to Complainant Dionne Staples of $10,429.76, plus interest at 3.13 percent, compounded annually and computed daily from September 25, 1992, until paid.

7. Within ten days of the date this Order becomes

final, Respondents shall inform all their agents and employees in the business of renting housing of the terms of this Order and educate them as to such terms and the requirements of the Fair Housing Act. All new employees shall be likewise informed no later than the evening of their first day of employment.

8. Respondents shall submit a written report to this tribunal within 15 days of the date this Order becomes final detailing the steps taken to comply with this Order.

9. The request by the Charging Party and the Intervenor for an award of damages to Complainant covering the period between May 27, 1992, and June 1, 1993, is denied.

This Order is entered pursuant to the decision of the Sixth Circuit Court of Appeals in *Kelly v. HUD*, 3 F.3d 951 (6th Cir. 1993), and the regulations codified at 24 C.F.R. § 104.910, and will become final upon the expiration of thirty (30) days or the affirmance, in whole or in part, by the Secretary of HUD within that time.

/s/ Thomas C. Heinz
THOMAS C. HEINZ
Administrative Law Judge

Dated: December 1, 1994.

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DECISION ON REMAND AND ORDER issued by THOMAS C. HEINZ, Administrative Law Judge, in HUDALJ 05-90-0879-1, were sent to the following parties on this 1st day of December, 1994, in the manner indicated:

Regular Mail:

Robert G Kelly, Esquire
4353 Montgomery Road
Norwood, OH 45212

Frederick M. Morgan, Jr., Esq.
Montgomery, Rennie & Jonson
2100 Society Bank Center
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INTEROFFICE MESSENGER:

Roberta Achtenberg, Assistant Secretary
Office of Fair Housing and Equal Opportunity
U.S. Department of Housing and Urban Development
451 7th Street, S.W., Room 5100
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APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER [DENYING PETITIONS FOR REHEARING]

Sixth Circuit Case No. 95-3008/3107
Filed January 24, 1997

E109 thru E110

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 95-3008/3107

Michael P. Kelly and John T. Kelly, Petitioners/Cross-Respondents,
V.
The Secretary, United States Department of Housing and Urban Development, Respondent, and
Dionne Staples, Respondent/Cross-Petitioner

ORDER

BEFORE: LIVELY, MERRITT, and RYAN, Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestions, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions

were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied. Judge Ryan would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

APPENDIX F

THE FAIR HOUSING ACT, TITLE VIII OF THE CIVIL RIGHTS ACT OF 1968, AS AMENDED--SELECTED EXCERPTS

Page No.

Section 802, 42 U.S.C. §3602 . . . . . F111

Section 804, 42 U.S.C. §3604 . . . . . F111

Section 810, 42 U.S.C. §3610 . . . . . F112

Section 812, 42 U.S.C. §3612 . . . . . F114

Section 813, 42 U.S.C. §3613 . . . . . F117

APPENDIX F

The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, As Amended—Selected Excerpts

Section 802, 42 U.S.C. § 3602—Definitions

As used in this subchapter—

(k) "familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with—

(1) a parent or another person having legal custody of such individual or individuals; or

(2) The designee of such parent of other person having such custody, with the written permission of such parent or other person.

Section 804, 42 U.S.C. § 3604—Discrimination in Sale or Rental of Housing and Other Prohibited Practices

As made applicable by section 803 of this title and except as exempted by sections 803(b) and 807 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make available or deny a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith,

because of race, color, religion, sex, familial status, or national origin.

Section 810, 42 U.S.C. § 3610—Administrative Enforcement; Preliminary Matters

(a) Complaints and Answers.

(1)(A)(i) An aggrieved person may, not later than one year after an alleged discriminatory housing practice has occurred or terminated, file a complaint with the Secretary alleging such discriminatory housing practice. The Secretary, on the Secretary's own initiative, may also file such a complaint.

* * *

(1)(B) Upon the filing of such a complaint—

(i) the Secretary shall serve notice upon the aggrieved person acknowledging such filing and advising the aggrieved person of the time limits and choice of forums provided under this title;

(ii) the Secretary shall, not later than 10 days after such filing or the identification of an additional respondent under paragraph (2), serve on the respondent a notice identifying the alleged discriminatory housing practice and advising such respondent of the procedural rights and obligations of respondents under this title, together with a copy of the original complaint;

(iii) each respondent may file, not later than 10 days after receipt of notice from the Secretary, an answer to such

complaint; and

(iv) the Secretary shall make an investigation of the alleged discriminatory housing practice and complete such investigation within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) with respect to a complaint, within 100 days after the commencement of such further action) unless it is impracticable to do so.

(C) If the Secretary is unable to complete the investigation within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) with respect to a complaint, within 100 days after the commencement of such further action), the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so.

* * *

(b) Investigative Report and Conciliation.

(1) During the period beginning with the filing of such complaint and ending with the filing of a charge or a dismissal by the Secretary, the Secretary shall, to the extent feasible, engage in conciliation with respect to such complaint.

* * *

(g) Reasonable Cause Determination and Effect.

(1) The Secretary shall, within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) with respect to a complaint, within 100 days

after the commencement of such further action), determine based on the facts whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, unless it is impracticable to do so, or unless the Secretary has approved a conciliation agreement with respect to the complaint. If the Secretary is unable to complete the investigation within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) with respect to a complaint, within 100 days after the commencement of such further action), the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so.

(2)(A) If the Secretary determines that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Secretary shall . . . immediately issue a charge on behalf of the aggrieved person, for further proceedings under section 812 [42 U.S.C. § 3612].

Section 812, 42 U.S.C. § 3612—Enforcement by Secretary

(a) Election of Judicial Determination. When a charge is filed under section 810, a comoplainant, a respondent, or an aggrieved person on whose behalf the complaint was filed, may elect to have the claims asserted in that charge decided in a civil action under subsection (o) in lieu of a hearing under subsection (b) . . . .

(b) Administrative Law Judge Hearing in Absence of

Election. If an election is not made under subsection (a) with respect to a charge filed under section 810, the Secretary shall provide an opportunity for a hearing on the record with respect to a charge issued under section 810. The Secretary shall delegate the conduct of a hearing under this section to an administrative law judge appointed under section 3105 of title 5, United States Code. The administrative law judge shall conduct the hearing at a place in the vicinity in which the discriminatory housing practice is alleged to have occurred or to be about to occur.

(c) Rights of Parties. At a hearing under this section, each party may appear in person, be represented by counsel, present evidence, cross-examine witnesses, and obtain the issuance of subpoenas under section 811. Any aggrieved person may intervene as a party in the proceeding. The Federal Rules of Evidence apply to the presentation of evidence in such hearing as they would in a civil action in a United States district court.

* * *

(g) Hearings, Findings and Conclusions, and Order.

(1) The administrative law judge shall commence the hearing under this section no later than 120 days following the issuance of the charge, unless it is impracticable to do so. If the administrative law judge is unable to commence the hearing within 120 days after the issuance of the charge, the administrative law judge shall notify the Secretary, the aggrieved person on whose behalf the charge was filed, and the

respondent, in writing of the resaons for not doing so.

(2) The administrative law judge shall make findings of fact and conclusions of law within 60 days after the end of the hearing under this section, unless it is impracticable to do so. If the administrative law judge is unable to make findings of fact and conclusions of law within such period, the administrative law judge shall notify the Secretary, the aggrieved person on whose behalf the charge was filed, and the respondent, in writing of the reasons for not doing so.

(3) If the administrative law judge finds that a respondent has engaged or is about to engage in a discriminatory housing practice, such administrative law judge shall promptly issue an order for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief. Such order may, to vindicate the public interest, assess a civil penalty against the respondent—

(A) in an amount not to exceed $10,000 if the respondent has not been adjudged to have committed any prior discriminatory housing practice;

* * *

(i) Judicial Review.

(1) Any party aggrieved by a final order for relief under this section granting or denying in whole or in part the relief sought may obtain a review of such order under chapter 158 of title 28, United States Code.

(2) Notwithstanding such chapter, venue of the proceeding

shall be in the judicial circuit in which the discriminatory housing practice is alleged to have occurred, and filing of the petition for review shall be not later than 30 days after the order is entered.

Section 813, 42 U.S.C. § 3613—Enforcement by Private Persons

(a) Civil Action.

(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this title, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

(B) The computation of such 2-year period shall not include any time during which an administrative proceeding under this title was pending with respect to a complaint or charge under this title based upon such discriminatory housing practice.

* * *

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Sixth Circuit Case No. 95-3008/3107
Filed November 27, 1996
Rehearing Denied January 24, 1997

Pages G118 thru G136

APPENDIX G

NOS. 95-3008 & 95-3107

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 95—2008 & 95—3107

MICHAEL P. KELLY and JOHN T. KELLY,

Petitioners

v.

THE SECRETARY, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, on behalf of DIONNE STAPLES, and DIONNE STAPLES,

Respondents

ON PETITION FOR REVIEW OF A DECISION OF THE SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC OF THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

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REQUIRED STATEMENT FOR REHEARING EN BANC

1. I express a belief, based upon a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the United States Court of Appeals for the Sixth Circuit and of the Supreme Court of the United States, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions:

—*NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969); *NLRB v. Ironworkers*, 466 U.S. 720 (1984); *Local 648, IBEW v. NLRB*, 440 F.2d 1184 (6th Cir. 1971); *NLRB v. Seligman and Assoc., Inc*, 808 F.2d 1155 (6th Cir. 1986); and,

—*Curtis v. Loether*, 415 U.S. 189 (1974); *Jordan v. Dellway Villa of Tenn., Ltd.*, 661 F.2d 588 (6th Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982), and *Stewart v. Furton*, 774 F.2d 706 (6th Cir. 1985).

2. I express a belief, based upon a reasoned and studied professional judgment, that this petition involves a question of exceptional importance:

> May a court, in reviewing an administrative enforcement order pursuant to the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, reduce an award of compensatory damages to the victim based upon HUD's delay in processing her complaint?

/s/

Marie K. McElderry
Attorney for the Secretary,
United States Department of
Housing and Urban Development

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 95—3008 & 95—3107

MICHAEL P. KELLY and JOHN T. KELLY,

Petitioners

v.

THE SECRETARY, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, on behalf of DIONNE STAPLES, and DIONNE STAPLES,

Respondents

ON PETITION FOR REVIEW OF A DECISION OF THE SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC OF THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

QUESTION PRESENTED

Whether, in reviewing an administrative enforcement order pursuant to the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, a court of appeals has authority to reduce an award of compensatory damages to the victim of discrimination based upon HUD's delay in processing her complaint.

STATEMENT

Dionne Staples, a single mother of twin five-year-old girls, sought to move out of her parents' apartment into one of her own. *Kelly v. HUD*, 3 F.3d 951, 952 (6th Cir. 1993). She saw a sign advertising a two-bedroom apartment in the neighborhood where she wished to live and called the telephone number listed on the sign. She was told that she had "one too many daughters" to qualify for the apartment because the owners only allowed one child per bedroom. *Ibid.* She contacted H.O.M.E., Inc., a fair housing group, which sent out testers, two of whom received similar information. The apartment was rented on March 17, 1990, to a couple without children. *Ibid.*

After continuing to look for approximately a month-and-a-half, Ms. Staples rented an apartment that was not as convenient as the one she had sought to rent from petitioners (3 F.3d at 952). While petitioners' apartment was served by a direct bus to her job, was near her family and friends, and was close to a drug store, grocery store, library, and parks, the

apartment she ultimately rented was not convenient to public transportation, shopping, or play areas for her children. *Ibid.* As a result, Ms. Staples' commute to work was approximately 25 minutes longer each way and required the use of both public transportation and a car borrowed from her parents (ALJ Initial Decision at 15-15). Because she could only borrow the car during the week, Staples was dependent upon friends and relatives on weekends for shopping and recreation (ALJ Initial Decision at 18).

Ms. Staples filed a complaint with HUD on May 17, 1990, alleging discrimination on the basis of race and familial status against respondents (hereinafter "the Kellys"). 3 F.3d at 953.[1] The HUD investigator completed his part of the investigation on October 2, 1990. HUD issued its determination that reasonable cause existed to charge respondents with discrimination on March 2, 1992, almost two years after the filing of the complaint.[2]

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[1] Shortly after a conciliation meeting on July 19, 1990, the complaint was amended to drop the allegation of racial discrimination.

[2] Although Congress anticipated that HUD's complaint processing would occur is [*sic*] less than 100 days, it did not provide any sanction against either HUD or a complainant for HUD's failure to meet any deadline established by the Act. Rather, the Act requires HUD to report at least annually concerning the number of instances in which the deadlines are not met and the reasons therefor. 42 U.S.C. 3608(e)(2)(B). Although the processing time for this complaint was lengthy, the affidavits submitted by HUD to the ALJ demonstrate that this was due, not to negligence, but rather to two other principal factors. First, HUD predictably experienced

An administrative hearing was held in May 1992. The Kellys sought dismissal of the charge of discrimination based upon procedural missteps by HUD during the investigation and conciliation of the complaint, especially allowing the investigator to act as the conciliator and the lengthy delay in issuing the charge of discrimination. The administrative law judge refused to dismiss the charge, finding that the Kellys had not been prejudiced by the delay, except with respect to the

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a substantial increase in the number of complaints it had to investigate after the Fair Housing Amendments Act of 1988 added new rights and remedies to the Act, effective March 12, 1989. Second, the amendments added two new bases of prohibited discrimination: familial status and handicap, each of which has its own unique statutory provisions which had not been previously interpreted.

During calendar year 1990, HUD received a record-breaking 4,457 complaints. While HUD closed 4,138 complaints during that year, it was unable to close 64% of its cases in under 100 days. *See* The State of Fair Housing—Report to the Congress Pursuant to Section 808(c)(2) of the Fair Housing Act at 6-7 (1990).

Staples' complaint, which involved familial status discrimination, was slightly more than one year after the new amendments became effective. The case received careful review in both the Regional Office and in the Washington office. That review process, which has since been streamlined within HUD, consumed a substantial amount of the elapsed time in this case. Each of the HUD employees to whom the case was assigned for conciliation, investigation, recommendation or review completed his or her function as quickly as possible given his or her increased workload and the novelty of the issues involved. See Charging Party's memorandum Pursuant To The Administrative Law Judge's August 16, 1994 Order—Knox Declar. ¶¶ 1-10; Jung Declar. ¶¶ 3, 7-8; Nixon Declar. ¶¶ 3-4, 7, 13; Rayford Declar. ¶¶ 3-6.

amount of monetary relief that could potentially be ordered. *HUD v. Kelly*, 1992 WL 406534 at *10 (HUDALJ Aug. 26, 1992). After finding the Kellys liable for discriminating against Staples, he held that there was no legal basis for reducing the amount of compensatory damages that he could award to the complainant. *Id.* at 13. In order to offset the increase in actual damages that resulted form HUD's delay, however, he declined to award a civil penalty of $3,000 in favor of HUD that he would otherwise have found appropriate. *Id.* at *15.

Accordingly, the ALJ awarded Ms. Staples a total of $10,340 in actual damages, $6,930.76 of which was to compensate her for the difference between the cost of the apartment she was denied and the alternative housing she found, the cost of finding alternative housing, her increased transportation costs to work, increased commuting time, and time spent prosecuting her claims. 1992 WL 406534 at *10-12. The ALJ calculated the amount of increased housing and transportation expenses from April 1990, when the discrimination occurred, to May 1992, the time of the hearing. *Id.* at *11. The remaining $3,500 was awarded for emotional injury and loss of housing opportunity. *Id.* at *14.

On the Kellys' petition for review of that order, this Court affirmed the finding of liability. 3 F.3d at 951. It vacated the award of damages, however, and remanded the case to HUD

for the purpose of conducting further conciliation. If further conciliation should fail, the Court instructed that "in no case should damages be assessed for the period during which HUD completely neglected this case." *Id.* at 958 (emphasis added).

On remand, conciliation again failed. The ALJ rejected arguments by HUD and Staples that he lacked authority to reduce the damages to the complainant, ruling that he was bound by this Court's determination on that issue. The Kellys did not identify any period of complete neglect by HUD (other than to argue that HUD had completely neglected the case from day one), and HUD argued that it had at no time completely neglected the case. The ALJ stated that he could not identify any evidence in the record that substantiated the existence of any period of complete neglect. *HUD v. Kelly*, 1994 WL 678738 at *5 (HUDALJ Dec. 1, 1994). In an effort to comply with this Court's 1991 [*sic*] decision, however, he reduced the damages award by $1. *Ibid.* The Kellys petitioned for review a second time, and Staples cross-petitioned.

A majority of the panel issued a decision that it said was designed to "follow the mandate of *Kelly I* that a respondent in a housing discrimination case cannot be made to pay for the government's neglect." *Kelly v. HUD*, 97 F.3d 118, 120 (6th Cir. 1996) (*Kelly II*). The sole legal authority cited by the majority in support of that holding is *Baumgardner v. HUD*, 960 F.2d 572 (6th Cir. 1992), a case in which damages were

reduced, but not because of HUD neglect or delay.[3]

The majority found that the "reasonable accrual period for damages in this case is twelve months: the period within which Congress intended HUD to carry out its administrative responsibilities and the standard term of a rental lease." *Kelly II*, 97 F.3d at 121.[4]

Judge Ryan issued a dissent expressing his "strong disagreement" with the majority. 97 F.3d at 122. He stated that "[t]here is absolutely nothing in the record to support 'twelve months' as the appropriate period for the damage award.'" *Id.* at 123. In addition, since the majority failed to identify any period when HUD completely neglected the case, as required by *Kelly I* for a reduction in damages, the dissent noted that there was no basis upon which the court could reverse the Secretary's judgment on remand. *Ibid.* The dissent stated that "[i]t is unjust in the extreme to penalize the victim, Staples, and reward the discriminators, the Kellys, because the majority is impatient with HUD." *Ibid.*

ARGUMENT

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[3] The damage award in *Baumgardner* was reduced because of deficiencies in the evidence. 960 F.2d at 580, 583.

[4] Although it did not cite the ALJ's Initial Decision, the majority appears to have based its calculations on a portion of that decision in which the ALJ noted that the time periods specified in the statute for each component of the agency to complete its responsibilities would total almost one year. *HUD v. Kelly*, 1992 WL 406534 at *13 n.19.

I

THE PANEL'S REDUCTION OF THE DAMAGE AWARD IS INCONSISTENT WITH SUPREME COURT PRECEDENT AND WITH DECISIONS OF THIS COURT APPLYING THAT PRECEDENT

1. The Supreme Court has made it clear that a court may not shift the consequences of agency delay away from the violator of federal law and onto the victim. The panel's decision is contrary to the principles of Supreme Court decisions under the National Labor Relations Act, 29 U.S.C. 160(c) (NLRA), and to decisions of this Court applying those principles. In *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969), the Court held that a court of appeals may not interfere with the NLRB's remedial power to implement the policy of the NLRA—to make employees whole for losses suffered on account of an unfair labor practice—by reducing the award because of the Board's delay in calculating the amount due. The Court's description of the circumstances in *Rutter-Rex* is reminiscent of the dissent's description of the panel opinion in this case (396 U.S. at 263-64):

> Either the company or the employees had to bear the cost of the Board's delay. The Board placed that cost upon the company, which had wrongfully failed to reinstate the employees. In an effort to discipline the Board for its delay, the court shifted part of that cost from the wrongdoing company to the innocent employees.

Compare 97 F.3d at 123 (Ryan, J., dissenting) ("It is unjust in the extreme to penalize the victim, Staples, and reward the discriminators, the Kellys, because the majority is impatient with HUD.").

The Court noted in *Rutter-Rex* that it had held in previous cases that "the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *Id.* at 265. The Court also made explicit the principle that a court reviewing the Board's award of backpay may not force the Board to reduce damages to the victim of an employer's discrimination because of the Board's administrative delay. That holding was reaffirmed by the Court in *NLRB v. Ironworkers*, 466 U.S. 720, 724-25 (1984) (court may not enter an order that "punishes employees for the Board's nonfeasance").[5] Moreover, the fact that the Court's admonition in *Rutter-Rex* was made in the context of the equitable relief of backpay, the award of which is discretionary, gives it even greater force when applied in the Fair Housing Act context, where compensatory damages are mandatory. *Curtis v. Loether*, 415 U.S. 189 (1974) (see discussion, pp. 9-12, *infra*).

This Court has construed *Rutter-Rex* in cases where the

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[5] Although *Rutter-Rex* and *Ironworkers* were decided under the NLRA, while this case arises under the Fair Housing Act, there appears to be no principled distinction upon which to rest a different result in this case.

NLRB has committed errors other than delay. In *Local 648, IBEW v. NLRB*, 440 F.2d 1184, 1185 (6th Cir. 1971), this Court stated that the Supreme Court has made clear that a reviewing court "should not deprive employees of their lawful rights because of neglect on the part of the NLRB."[6] See also *NLRB v. Seligman & Assoc., Inc.*, 808 F.2d 1155, 1162 (6th Cir. 1986) (applying the principle that, "when faced with the choice of placing the burden of Board errors on either a wrongfully discharged employee or her former employer, the Supreme Court has chosen to burden the employer").[7]

Although the panel majority states that this Court's decision in *Baumgardner v. HUD*, 960 F.2d 572 (1992),

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[6] The NLRB neglect in that case constituted its failure to enter important evidence into the record, resulting in the trial examiner permitting reopening of the record for presentation of that evidence.

[7] Although no court has applied *Rutter-Rex* in the context of the Fair Housing Act, courts of appeals in other circuits have applied *Rutter-Rex* in cases under Title VII of the Civil Rights Act of 1964. In *Kraszewski v. State Farm Gen'l Ins. Co.*, 912 F.2d 1182, 1186 (9th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991), the court held that the holding of *Rutter-Rex* is as applicable to Title VII as it is to the NLRA because Title VII's remedial provisions were based on, and have purposes similar to, those of the NLRA. See also *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 932-33 (10th Cir. 1979) (district court cannot reduce backpay award so as to put portion of cost of lengthy court process on victims of discrimination, rather than on employers). Here again, since the award of backpay under Title VII, like a similar award under the NLRA, is equitable in nature, and hence discretionary, the Rutter-Rex principle should apply with even greater force to mandatory Fair Housing Act damages.

supports its "view that an appellate court may reduce damages caused by HUD's delay," the decision in this case goes well beyond *Baumgardner*. While the Court in *Baumgardner* stated that "HUD's delay and handling did have an adverse impact on the question of damages," 960 F.2d at 580, the Court did not reduce any damages to the complainant on that basis.[8] Rather, it reduced the civil penalty in favor of HUD. *Id.* at 583. That action, already taken by the ALJ in this case, more properly places the consequences of delay and mishandling upon the agency that caused it, rather than on the complainant, who had no control over the process.

2. The panel majority's decision to reduce Staples' damages by more than half because HUD delayed in processing her complaint is also inconsistent with Supreme Court precedent concerning the proper measure of remedial relief due a victim of discrimination. In *Curtis v. Loether*, 415 U.S. 189 (1974), the Court held that damage awards under the Fair Housing Act are legal remedies governed by tort principles. In

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[8] The panel majority's perception that *Baumgardner* supported its decision may, in part, be attributable to the fact that the Court in *Baumgardner* erroneously referred to the civil penalty as a "civil penalty damages award." 960 F.2d at 583. The Court in *Baumgardner* reduced the compensatory damages award, however, not because of any actions by HUD, but because of lack of proof of economic loss to the complainant, 960 F.2d at 580, and, based "on the facts of th[at] case," the lack of necessity for an award of "presumed damages" for loss of civil rights. *Id.* at 583.

contrast to the discretion available to a court in making an award of equitable relief, "if a [Fair Housing Act] plaintiff proves unlawful discrimination and actual damages, [s]he is entitled to judgment for that amount." *Id.* at 197. This Court has interpreted *Curtis v. Loether* as holding that "recovery of damages is mandated" when unlawful discrimination has been established. *Jordan v. Dellway Villa of Tenn., Ltd.*, 661 F.2d 588, 594 (1981), *cert. denied*, 455 U.S. 1008 (1982). The Court quoted with approval the argument made by the class of plaintiffs in *Jordan*, who allegedly were denied housing because of race, that "damage awards must reflect what actually occurred, they must measure the plaintiffs' (actual) losses * * *." *Ibid.* See also *Stewart v. Furton*, 774 F.2d 706, 710 (6th Cir. 1985) (quoting *Curtis* in reversing lower court's refusal to award damages to victim of housing discrimination).[9]

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[9] The Ninth Circuit in *United States v. City of Hayward*, 36 F.3d 832 (1994), *cert. denied*, 116 S.Ct. 65 (1995), forcefully rejected the argument of the defendant in that case that a court has discretion whether to enter an award of compensatory damages in a civil action brought by the United States under 42 U.S.C. 3614. The court held that, despite its use of the phrase "may award" in describing the relief permitted by the Act, "Congress did not intend the courts to have discretion to award compensatory damages if a party has proven actual damages." 36 F.3d at 839. In so holding, the court relied upon the fact that Congress was aware of the Supreme Court's interpretation of the mandatory nature of Fair Housing Act damages in *Curtis v. Loether* and did not alter the language of the remedial provision of Section 3614. *Ibid.* The court also relied on language in the House Report on the 1988 amendments to the Act that "[a]llowing the court to award monetary relief to persons aggrieved avoids

The Fair Housing Act requires an ALJ who has found that a respondent has engaged in a discriminatory housing practice to order appropriate relief, including actual damages suffered by the aggrieved person. 42 U.S.C. 3512(g)(3). Nothing in the Act requires or permits the damages awarded to be limited to one year from the date a complaint is filed or for any other amount that is less than the "actual damages suffered." *Ibid.* Indeed, the periods allowed by the statute for various stages of the procedure show that Congress contemplated that damages might accrue for far longer than 12 months. For example, a victim of discrimination has 365 days to file a complaint with HUD, 42 U.S.C. 3610(a)(1)(A)(i); then HUD has 100 days, or more, if not practicable, to investigate and bring a charge, 42 U.S.C. 3610(a)(1)(C); 120 days to try it, 42 U.S.C. 3512(g)(1); 60 days to reach an administrative decision, 42 U.S.C. 3612(g)(2); and 30 days for Secretarial review, 42 U.S.C. 35612(h), for a total of at least 675 days.

Further, Staples could have chosen to go to court rather than to pursue her administrative remedies. In such a case, the Act provides a two-year statute of limitations (42 U.S.C. 3613(a)), which is tolled during the entire period that HUD is investigating a complaint. *Ibid.* Had Staples filed a civil action, there is no doubt that she would have been entitled,

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later duplicative litigation as such persons bring actions to vindicate their rights." H.R. Rep. No. 711, 100th Cong., 2d Sess., 40 (1988).

under *Curtis v. Loether*, 415 U.S. 189 (1974), to a full award of damages.

As this Court has recognized, the purpose of the Fair Housing Act is to make whole the victims of discrimination. *United States v. Birmingham*, 727 F.2d 560, 566, *cert. denied*, 469 U.S. 821 (1984). Reducing compensatory damages to a victim of housing discrimination directly contravenes that purpose.

The holding of the panel majority ignores the edicts of the Supreme Court in *Curtis*, this Court's decisions in *Jordan* and *Stewart*, and the Act itself, by denying Staples that which the Act makes mandatory—*i.e.*, compensatory damages in the amount that was proven to be her actual losses. The panel decision reducing her damages fails to make her whole and, if permitted to stand, would permit other aggrieved persons to be made less than whole. Rehearing *en banc* is necessary to ensure that actual damages for housing discrimination, both for Staples and for future aggrieved persons, are not limited arbitrarily to those damages that accrue in the first 12 months.

II.

THE PANEL'S DECISION UNDERMINES THE ENFORCEMENT SCHEME OF THE 1988 FAIR HOUSING ACT AMENDMENTS

The panel's decision not only penalizes this victim for HUD conduct beyond her control, but it also undermines the enforcement scheme created by Congress under the Fair

Housing Act. Congress amended the Act in 1988 to provide victims of discrimination with an administrative alternative to the more costly and burdensome avenue of private litigation. See H.R. Rep. No. 711, *supra*, at 15-16; 134 Cong. Rec. 19882 (1988) (Statement of Sen. Specter) ("aggrieved parties, who are invariably poor and unable to support [the] cost of litigation, simply have no remedy to effectuate th[e] right" to fair housing). See also *HUD v. Blackwell*, 908 F.2d 864, 868-869 (11th Cir. 1990).

To "fill that void" in the FHA enforcement scheme, the 1988 Amendments gave HUD a more active role in enforcement of the Act, including the authority to award actual damages to victims of discrimination. H.R. Rep. No. 711, *supra*, at 13. The panel's decision will thwart Congress's enforcement scheme by discouraging victims from pursuing this administrative remedy. Instead, in order to ensure that they are able to obtain a fully compensatory remedy, those victims who are able to obtain private counsel would be forced to return to the more costly avenue of litigation through the courts.[10]

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[10] The panel's decision also raises the specter of a two-tiered system of justice that works to the detriment of complainants who need to rely on the federal administrative process because they cannot afford to bring an action in court. For discrimination suffered on the same date, a victim who brings a case to HUD that requires more than one year to process may be limited to one year of damages under the reasoning of the

CONCLUSION

For the foregoing reasons, the panel opinion should be vacated and the case reheard by the Court *en banc*.

Respectfully submitted,

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panel decision (at least if HUD does not timely issue a 100-day letter) but a victim with the resources to go to court suffers no similar penalty even if her case is heard at the same time. This dissimilar treatment of discrimination victims is in tension with due process and equal protection principles. Cf. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438-442 (1982).

APPENDIX H

UNITED STATES COURT OF APPEALS
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT

OFFICE OF AMINISTRATIVE LAW JUDGES

DECLARATION IN SUPPORT OF THE CHARGING PARTY'S MEMORANDUM PURSUANT TO THE ADMINISTRATIVE LAW JUDGE'S AUGUST 16, 1994 ORDER

HUDALJ No. 90-0879-1
Filed September 16, 1994

H137 thru H160

APPENDIX H

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Dionne Staples,	)	
Charging Party,	)	HUDALJ 05-90-0879-1
v.	)	
Michael P. Kelly and John T. Kelly,	)	
Respondents.	)	

DECLARATION IN SUPPORT OF THE CHARGING PARTY'S MEMORANDUM PURSUANT TO THE ADMINISTRATIVE LAW JUDGE'S AUGUST 16, 1994 ORDER

I, Charles C. Jung, declare the following facts to be true to the best of my knowledge and remembrance of the above captioned complaint; and, if called as a witness, would competently testify as follows:

1. I was the Investigator/Conciliator assigned the housing discrimination complaint known as *Staples v. Kelly*, 05-90-0879-1. My contact with respondents began on May 24,

1990, five days prior to actually receiving the case file, when Michael Kelly called me by telephone to find out how the complaint process worked.

2. Between May 24, 1990 and June 23, 1990 I was contacted by phone by John T. Kelly and asked to provide a copy of the Regulations pursuant to the Fair Housing Act. I am unsure of the exact date.

3. On June 23, 1990, I telephoned Respondents to schedule a conciliation conference for July 18, 1990. I believe the arrangements for this face to face meeting were made with John Kelly. My work load requirements coupled with respondents' schedules prevented the conference from taking place before June 23. My scheduled vacation and respondents' scheduled prevented the conference from occurring before July 18, 1990.

4. Conciliation was not successful at the face to face conference held at the Cincinnati office of HUD on July 19, 1990 (changed at the request of respondents). However, on at least two subsequent dates—July 23 and August 2, 1990, I asked John Kelly, by phone, if he or his brother, Michael, wanted to make a counter offer to the demands complainant made at the face to face conference. At no time did either ever make any offer of settlement.

5. Investigation began on September 17, 1990 when John Kelly came to my office with records regarding who had moved into the subject vacant unit and other 1990 vacancies. On September 25, 1990 I measured the subject unit. The

investigation ended on October 2, 1990 after I interviewed Complainant.

6. Between September 25 and October 2, 1990 I prepared my handwritten Final Investigation Report and forwarded it and the case file to the Chicago Regional Office.

7. During 1990, I received a total of sixty-five complaint files from the Chicago Regional Office. In addition, I carried forward over 25 cases that were filed in 1989. Twenty-two open cases were in my possession on May 29, 1990 when I received *Staples v. Kelly*, along with three other files. Between May 29 and October 2, 1990, when I submitted the Final Investigation report for *Staples v. Kelly*, I received 20 more case assignments. While I would always accommodate the conciliation of any recently filed complaint, the investigation of earlier filed complaints would have preference over the investigation of those recently received by me. Therefore, I conducted and completed investigations received prior to May 29, 1990 before I completed the investigation in *Staples v. Kelly*.

8. The date I submitted the subject case file to Chicago was 123 days from the date I received it (or 132 days from the date it was filed with HUD). My average processing time for all of the cases filed in 1990 which required me to conduct full investigations was 141.5 days.

9. The above is based on my independent recollection of the facts as well as a review of the contact and milestone log of the investigatory file.

I declare under penalty of perjury that the foregoing is true and correct.

9/23/94	/s/
Date	Charles C. Jung Equal Opportunity Specialist

APPENDIX H

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Dionne Staples,	)	
Charging Party,	)	
	)	HUDALJ 05-90-0879-1
v.	)	
Michael P. Kelly and John T. Kelly,	)	
Respondents.	)	

DECLARATION IN SUPPORT OF THE CHARGING PARTY'S MEMORANDUM PURSUANT TO THE ADMINISTRATIVE LAW JUDGE'S AUGUST 16, 1994 ORDER

I, Charles C. Jung, declare the following facts to be true to the best of my knowledge and remembrance of the above captioned complaint; and, if called as a witness, would competently testify as follows:

1. I was the Investigator/Conciliator assigned the housing discrimination complaint known as *Staples v. Kelly*, 05-90-0879-1. My contact with respondents began on May 24,

1990, five days prior to actually receiving the case file, when Michael Kelly called me by telephone to find out how the complaint process worked.

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8. The date I submitted the subject case file to Chicago was 123 days from the date I received it (or 132 days from the date it was filed with HUD). My average processing time for all of the cases filed in 1990 which required me to conduct full investigations was 141.5 days.

9. The above is based on my independent recollection of the facts as well as a review of the contact and milestone log of the investigatory file.

I declare under penalty of perjury that the foregoing is true and correct.

9/23/94
Date

/s/
Charles C. Jung
Equal Opportunity
Specialist

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Dionne Staples,	)	
Charging Party,	)	HUDALJ 05-90-0879-1
v.	)	
Michael P. Kelly and John T. Kelly,	)	
Respondents.	)	

DECLARATION IN SUPPORT OF THE CHARGING PARTY'S MEMORANDUM PURSUANT TO THE ADMINISTRATIVE LAW JUDGE'S AUGUST 16, 1994 ORDER

I, Barbara M. Knox, declare the following facts to be true, and, if called as a witness, would competently testify as follows:

1. I am the Deputy Director of the Midwest Office of Fair Housing and Equal Opportunity ("FHEO"), United States Department of Housing and Urban Development ("HUD"). In this capacity, I directly supervise or otherwise oversee the day-to-day management operations of the Office, including all

investigative aspects of HUD's implementation and enforcement of the Fair Housing Act. I have held the position since March 1990.

2. Under 24 C.F.R. Section 103, HUD's Office of Fair Housing and Equal Opportunity has the authority to conduct investigations of complaints filed with HUD pursuant to the Fair Housing Act, and engage in conciliation with respect to such complaints.

3. The subject complaint was officially filed with this office on May 17, 1990. Notification letters were mailed to the parties on or about May 18, 1990. The complaint was assigned to Charles Jung for both conciliation and investigation on May 29, 1990. Mr. Jung is an Equal Opportunity Specialist assigned to the then Chicago Regional Office of HUD's Office of Fair Housing and Equal Opportunity. Although so assigned, Mr. Jung is "outstationed" at the Cincinnati HUD Office.

4. The complaint was amended on July 27, 1990 for the purpose of naming an additional respondent. Notification of the amended complaint was mailed to all parties on the same date.

5. A handwritten draft of Mr. Jung's final investigative report was received in this office on October 19, 1990. The draft was first typed on October 22, 1990. It was initially reviewed on or about November 1, 1990 and submitted for retyping with corrections. The final investigative report was retyped on November 6, 1990 and subsequently reviewed on November 13, 1990. It was forwarded to FHEO Headquarters

on December 13, 1990.

6. The final investigative report was received in the Headquarters FHEO Office of Investigations on January 7, 1991. It was reviewed in the Office of Investigations and subsequently forwarded to the Office of General Counsel with a recommendation of reasonable cause on January 17, 1991.

7. The complaint was in the possession of this office for a total of 210 days. The mount of processing time required for this complaint was a direct result of the situation existing in this office at that time. Following the implementation of the Fair Housing Amendments Act in March 1989, HUD received an unprecedented influx of fair housing complaints. This was due both to the new protected classes included in the Fair Housing Act and public information efforts by the Department.

8. Indicative of this increase is the number of complaints received in this office in 1988 and 1989 versus the number received in 1990. In 1988, this office received 956 complaints; in 1989, 1468; and, in 1990, 2032.

9. In addition, the Act required that HUD revamp its investigation procedures and greatly improve the quality of its investigative reports. Case processing guidelines were still being disseminated and clarified to address this new requirement at the time this complaint was investigated. These changes required extensive staff training in areas of the law, administrative procedure, and investigative techniques.

10. In 1990, therefore, this office had a massive backlog of complaint investigations. Our inventory consisted

of approximately 750 complaints over 100 days old. Individual investigators were assigned between 40 and 50 complaints. (The figure of 10 to 15 complaints assigned per investigator was the average workload prior to implementation of the Fair Housing Amendments Act, and is consistent with the average workload per investigator this year. The massive backlog referred to herein relates to the period between 1989 and 1991.) Given these circumstances, this complaint was investigated in as timely a manner as possible.

11. The above is based on my independent recollection of the facts as well as a review of the investigative file and information obtained from our computerized case inventory system known as the Complaint Compliance Review System ("CCRS").

I declare under penalty of perjury that the foregoing is true and correct.

9/23/94
Date

/s/
Barbara M. Knox
Deputy Director
Midwest Office of Fair Housing
and Equal Opportunity

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Dionne Staples,	)	
Charging Party,	)	
v.	)	HUDALJ 05-90-0879-1
Michael P. Kelly and John T. Kelly,	)	
Respondents.	)	

DECLARATION IN SUPPORT OF THE CHARGING PARTY'S MEMORANDUM PURSUANT TO THE ADMINISTRATIVE LAW JUDGE'S AUGUST 16, 1994 ORDER

I, Robert Bouchard, declare the following to be true, and if called as a witness, I would competently testify as follows:

1. I am the primary program/system analyst for the automated HUD Fair Housing complaint tracking system (Integrated Title VIII Tracking System), employed in the Management Information System Staff office of HUD's Office of Fair Housing and Equal Opportunity. In this capacity I directly manage the system on a daily basis, and have direct

knowledge of the Title VIII 100-day letter notification process. I have held this position since approximately December 1989.

2. The tracking system's letter audit function indicates that 100-day letters were created on August 30, 1990, to notify the parties that HUD's processing of the case could not be completed within 100 days. Letters were created for one complainant (Staples), and three respondents (Kelly Realty, M. Kelly, and D. Kelly).

3. The process at that time was to generate these letters twice weekly. When the 100-day letter generation process was run, it automatically created letters for any open case that was over 100 days old. The letters were then hand carried to the HUD mail room for mailing.

4. The above is based on my daily experience with the tracking system, including its automatic recording (audit) and security functions, its automated 100-day letter process, and my visual inspection of the system data.

I declare under penalty of perjury that the foregoing is true and correct.

9/26/94
Date

/s/
Robert R. Bouchard

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Dionne Staples,	)	
Charging Party,	)	HUDALJ 05-90-0879-1
v.	)	
Michael P. Kelly and John T. Kelly,	)	
Respondents.	)	

DECLARATION IN SUPPORT OF THE CHARGING PARTY'S MEMORANDUM PURSUANT TO THE ADMINISTRATIVE LAW JUDGE'S AUGUST 16, 1994 ORDER

I, Konrad J. Rayford, a resident of Chicago, Illinois, declare the following facts to be true, and if called as a witness, I would competently testify as follows:

1. I am an attorney licensed by the Bar of Illinois and I am employed by the United States Department of Housing and Urban Development, located in Chicago, Illinois as an Attorney-Advisor in the Office of the Assistant General Counsel for the Midwest.

2. On February 14, 1991, I was assigned the case entitled *Dionne Staples v. Michael P. Kelly, et al.*, HUDALJ 05-90-0879-1 for review and preparation of a determination of reasonable cause and charge of discrimination or determination of no reasonable cause.

3. At the time I was assigned the *Kelly* case, I was or had been assigned nine other cases for review and preparation of determinations. A total of 25 cases that were assigned to our Office during 1991 for determinations or reasonable cause or no reasonable cause were assigned to me.

4. My other work during 1991 included the following:

a. Administrative proceedings before the Merit Systems Protection Board in four cases. Two of these cases, which went to hearing, were particularly time consuming, requiring substantial review, trial preparation and pretrial conferences, as well as the handling of the hearings. One was assigned to me in January 1991 and went to hearing in May 1991. The other was assigned to me in May 1991 and went to hearing in July 1991.

b. Preparation of a written legal review of a local ordinance for substantial equivalency to the Fair Housing Act. Three other such ordinances were assigned to me for similar review in the latter part of 1991, and the reviews in two of them were completed in February, 1992 and March 1992, respectively.

c. Legal research, advice and assistance to persons within and outside of the Department on a variety of

matters.

5. I made my best effort to review the *Kelly* case as expeditiously as possible considering my other cases and assignments. Given my workload, it was impracticable to complete review of the *Kelly* case before December 1991.

6. During the second week of November 1991, I began reviewing the *Kelly* case. On or about December 5, 1991, I completed the review and prepared a proposed Determination of Reasonable Cause and Charge of Discrimination and an Executive Summary analyzing the issues in the case, and submitted the case to Geoffrey Roupas, the supervisory Associate Regional Counsel. Mr. Roupas recommended some changes, which were made, and he subsequently concurred in the proposed Determination and Executive Summary and submitted it for the Regional Counsel Lewis Nixon's review and concurrence on December 10, 1991.

7. HUD's Regional Counsel signed the Executive Summary on December 10, 1991. The Executive Summary was transmitted on December 11, 1991 to the Regional Counsel for approval.

8. In a memorandum dated January 13, 1992, the Assistant General Counsel transmitted a memorandum to the Regional Counsel recommending that certain changes in the Executive Summary be made.

9. After the memorandum was received in the Office of the Regional Counsel on January 15, 1992, I prepared an amended Executive Summary and submitted it to the Associate

Regional Counsel on or about January 22, 1992.

10. On January 13, 1992, the amended Executive Summary was concurred in by the Associate Regional Counsel and the Regional Counsel and transmitted to the Office of the General Counsel.

11. On February 13, 1992, the General Counsel signed the revised Executive Summary approving the Regional Counsel's issuance of a Determination of Reasonable Cause and Charge of Discrimination. This was received by the Regional Counsel on or about February 15, 1992.

12. On March 2, 1992, the Determination of Reasonable Cause and Charge of Discrimination was issued.

13. The above is based on my independent recollection of the facts, as well as a review of the attorney work product and deliberative documents in the case file.

I declare under penalty of perjury that the foregoing is true and correct.

9/26/94
Date

/s/
KONRAD J. RAYFORD
Attorney-Advisor
Office of the Assistant General Counsel for the Midwest U.S. Department of Housing and Urban Development

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Dionne Staples,	)	
Charging Party,	)	HUDALJ 05-90-0879-1
v.	)	
Michael P. Kelly and John T. Kelly,	)	
Respondents.	)	

DECLARATION IN SUPPORT OF THE CHARGING PARTY'S MEMORANDUM PURSUANT TO THE ADMINISTRATIVE LAW JUDGE'S AUGUST 16, 1994 ORDER

I, Lewis M. Nixon, declare the following to be true, and if called as a Witness, I would competently testify as follows:

1. I am the Assistant General Counsel for the Midwest Office of the United States Department of Housing and Urban Development located in Chicago, Illinois. Prior to April 1994, my title was Regional Counsel for Region V. As Regional Counsel, I issued the Charge of Discrimination in *HUD v. Kelly*, HUDALJ 05-90-0879-1.

2. This Office received the investigative file in the *Kelly* case on February 8, 1991 for a determination of reasonable cause or no reasonable cause.

3. At the time we received the *Kelly* case, this Office was faced with the twin problems of novel work and a particularly heavy workload of cases. The month before, in January 1991, the authority to make determinations of reasonable cause or no reasonable cause and to issue charges of discrimination under the Fair Housing Act had been largely re-delegated to the Regional Counsel, with the General Counsel retaining concurrence authority on charges of discrimination based on handicap and familial status. Also in January 1991, my Office received under this new re-delegation of authority its first 18 cases, the largest monthly assignment of new fair housing cases we have received to this date. During calendar year 1991, my Office received 103 cases, the largest number of cases received by our Office in any year.

4. I assigned four attorneys to work on fair housing matters during the entirety of calendar year 1991. Three of these attorneys spent most of their time on fair housing matters. The fourth attorney spent approximately half his time on fair housing, primarily in a supervisory capacity. Other competing needs for legal services in the Regional Office precluded the assignment of any more legal staff to fair housing.

5. For cases assigned to this Office during 1991 for determinations of reasonable cause or no reasonable cause, an average of 11 months elapsed between the time of the

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assignment and the issuance of a determination.

6. On February 14, 1991, the *Kelly* case was assigned to Konrad J. Rayford to review and to prepare a determination of reasonable cause or no reasonable cause.

7. Either prior to or at the same time the *Kelly* case was assigned to Mr. Rayford, nine other similar fair housing cases were assigned to him. Mr. Rayford was assigned 25 of the 103 fair housing cases our Office received during 1991. In ten of those 25 cases, the complaint was older than in the *Kelly* case. In only six of the 25 cases initially assigned to Mr. Rayford during 1991 were determinations issued in a shorter time, counting from the time of assignment to our Office, than in the *Kelly* case. For cases initially assigned to Mr. Rayford during 1991 for which determinations of reasonable cause or no reasonable cause were issued, an average of 14 months elapsed between the time of the assignment and the issuance of the determination. At the time the *Kelly* case was assigned to Mr. Rayford, he had other matters, both fair housing and non-fair housing matters, assigned to him. During 1991, I estimate that Mr. Rayford spent half to two-thirds of his time on fair housing matters, which included matters in addition to the 25 cases assigned to him for determination of reasonable cause or no reasonable cause.

8. On December 10, 1991, I signed an Executive Summary regarding the *Kelly* case and transmitted it to the Office of the General Counsel for concurrence along with a proposed Determination of Reasonable Cause and Charge of

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Discrimination.

9. On January 15, 1992, I received a memorandum from the Assistant General Counsel dated January 13, 1992 suggesting certain changes in the Executive Summary for the *Kelly* case.

10. An amended Executive Summary was prepared for the *Kelly* case, and by memorandum dated January 13, 1992, I transmitted the revised Executive Summary to the General Counsel's Office.

11. On February 13, 1992, the General Counsel signed the revised Executive Summary approving my issuance of a Determination of Reasonable Cause and Charge of Discrimination for the *Kelly* case.

12. On March 2, 1992, I issued the Charge of Discrimination in the *Kelly* case.

13. Given the heavy fair housing workload and competing needs for legal services, it was impracticable to recommend and take action on the *Kelly* case sooner than we did.

The above is based on my independent recollection of the facts as well as a review of the attorneys' work product and deliberative documents.

I declare under penalty of perjury that the foregoing is true and correct.

9/26/94 /s/

Date Lewis M. Nixon

Assistant General Counsel
for the Midwest
Department of Housing and
Urban Development

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Dionne Staples,	)	
Charging Party,	)	HUDALJ 05-90-0879-1
v.	)	
Michael P. Kelly and John T. Kelly,	)	
Respondents.	)	

DECLARATION IN SUPPORT OF THE CHARGING PARTY'S MEMORANDUM PURSUANT TO THE ADMINISTRATIVE LAW JUDGE'S AUGUST 16, 1994 ORDER

I, Harry L. Carey, declare the following to be true, and if called as a witness, I would competently testify as follows:

1. I am the Assistant General Counsel for Fair Housing Enforcement in the Office of the General Counsel ("OGC"), United States Department of Housing and Urban Development ("HUD"). In this capacity I directly supervise or otherwise oversee all legal aspects of HUD's implementation and enforcement of the Fair Housing Act ("Act"), 42 U.S.C.

§§ 3601-19. I have held this position since December 1988.

2. Under 24 C.F.R. § 103.400(a)(2) (1993), HUD's General Counsel has the authority to issue determinations of reasonable cause and issue charges of discrimination in complaints filed with HUD pursuant to the Act.

3. By notice in the Federal Register, HUD's General Counsel delegated that authority to HUD's 10 Regional Counsel, except with regard to complaints, *inter alia*, found by the General Counsel to involve either complex facts or novel issues of law. 56 Fed. Reg. 2931-32 (1991). By the same Federal Register notice, the General Counsel delegated to the Associate General Counsel for Equal Opportunity and Administrative Law (the title of my immediate supervisor at that time) and me the authority to determine which complaints involve, *inter alia*, complex facts or novel issues of law. *Id.*

4. By January 15, 1991 memorandum, the General Counsel set out procedures whereby, in complaints alleging discrimination based on familial status or handicap, the Regional Counsel would have to submit to the General Counsel for approval an Executive Summary of the case, as well as a copy of the proposed determination and charge before the Regional Counsel could issue the determination and charge. A copy of the January 15, 1991 memorandum is attached to this declaration as Attachment 1.

5. My office received the case file form HUD's Office of Fair Housing an Equal Opportunity in a memorandum dated January 17, 1991. On February 6, 1991, my office transmitted

the file to the HUD Region V Regional Counsel, having determined that the case did not involve complex facts or novel issues of law.

6. On December 10, 1991, HUD's Region V Regional Counsel signed an Executive Summary respecting the above-captioned case. Pursuant to the January 15, 1991 memorandum, by December 11, 1991 memorandum, he transmitted to the General Counsel's office that Executive Summary and a proposed Determination of Reasonable Cause and Charge of Discrimination.

7. On December 16, 1991, HUD's Principal Deputy General Counsel, upon his review of the submitted material, wrote a note to the General Counsel regarding the Regional Counsel's submittal.

8. The General Counsel, upon his review of the submitted material, wrote a note to the Associate General Counsel for Equal Opportunity and Administrative Law and me regarding the Regional Counsel's submittal, and the submittal was given to me. The note was dated December 17, 1991.

9. I then referred the matter to the Deputy Assistant General Counsel for Fair Housing Litigation, who, on January 3, 1992, wrote me a memorandum containing his analysis of the matter with options as to how OGC might proceed with the matter.

10. I agreed with my Deputy's analysis and instructed him to proceed with one of the options he had proposed.

11. My Deputy assigned the matter to one of the

attorneys on my staff, who drafted a memorandum to the Regional Counsel from me. The memorandum referred to the notes of the General Counsel and the Principal Deputy General Counsel and suggested certain changes in the Executive Summary. This memorandum was typed in final on January 9, 1992; the staff attorney concurred in it on January 10; 1992; and the Deputy also concurred in it on January 10, 1992; and I signed and sent it to the Regional Counsel on January 13, 1992.

12. In a January 31, 1992 memorandum, the Regional Counsel transmitted a revised Executive Summary regarding the case to the General Counsel's office.

13. On February 13, 1992, upon his review of the revised Executive Summary and cover memorandum, the Principal Deputy General Counsel wrote a note to the General Counsel regarding the revised Executive Summary.

14. On February 13, 1992, the General Counsel signed the revised Executive Summary approving the Regional Counsel's issuance of a Determination of Reasonable Cause and Charge of Discrimination.

15. Except for paragraph 5 of this declaration, the above is based on my independent recollection of the facts, as well as a review of attorney work product and deliberative documents in the case file. Paragraph 5 is based on my review of data in HUD's Title VIII Case Tracking System.

I declare under penalty of perjury that the foregoing is true and correct.

9/16/94
Date

/s/
Harry L. Carey
Assistant General Counsel
for Fair Housing Enforcement
Office of the General Counsel
Department of Housing and
Urban Development

MOTION FILED
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(2)

No. 96-1712

In the

Supreme Court of the United States

October Term, 1996

Dionne Staples,
Petitioner,

v.

Michael P. Kelly and John T. Kelly,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE THE NATIONAL FAIR HOUSING ALLIANCE AND TOLEDO FAIR HOUSING CENTER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37 of the Rules of the Supreme Court, the National Fair Housing Alliance and The Fair Housing Center, Toledo, Ohio, sought permission from all parties to this action to file a brief in support of certiorari as *amici curiae*. The Acting Solicitor General, on behalf of the Secretary of the United States Department of Housing and Urban Development, respondent below, and Dionne Staples, one of the petitioners below, have granted consent. Copies of the letters granting consent have been filed with the Clerk.

Michael P. Kelly and John T. Kelly, also petitioners below, have withheld consent. Therefore, the National Fair Housing Alliance and The Fair Housing Center, Toledo, Ohio, respectfully move the Court for leave to file a brief, as *amici curiae*, in support of Dionne Staples' petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit that was entered in this proceeding.

The National Fair Housing Alliance, Inc. (NFHA) is a non-profit corporation that represents private fair housing centers throughout the United States. NFHA assists private fair housing centers by conducting research into the nature and effects of housing discrimination, advocating for effective programs of fair housing compliance enforcement, and sponsoring national education conferences on fair housing issues and fair housing litigation. NFHA regularly participates as an *amicus curiae* in cases that involve important interpretations of fair housing laws.

The Toledo Fair Housing Center (the Center) is an operating member of the National Fair Housing Alliance. The Center works to eliminate practices of housing discrimination and to expand equal housing opportunities in Northwestern Ohio through efforts that include fair housing enforcement and litigation.

In this case, an issue has arisen as to whether a court of appeals may reduce an administrative law judge's award of actual damages to a Fair Housing Act complainant because the Department of Housing and Urban Development did not proceed in compliance with the time limits set forth in the Act, 42 U.S.C. § 3601 *et seq.* This issue is of particular concern to NFHA and its members, including the Center, because the appeals court's decision will affect the choice of forum for claims filed under 42 U.S.C. § 3610, and because it will likely have important precedential value for similar cases in other jurisdictions. If the decision is not reversed, private fair housing organizations like the Center and other NFHA members will need to counsel aggrieved persons to have their claims judicially determined, rather than decided in the administrative forum established by the Fair Housing Amendments Act, to ensure that their actual damage awards are not reduced because of administrative delays over which they have no control. This result will thwart one of Congress's primary purposes in passing the Fair Housing Amendments Act, namely, "to provide ...effective enforcement ...by creating an administrative enforcement system." H.R. Rep. No. 711, 100th Cong., 2d Sess. 38, *reprinted in* 1988 U.S.C.C.A.N.2173, 2174.

As national and regional organizations with specific interests in fair housing enforcement, NFHA and the Center have a view of the administrative consequences of the appeals court's decision that might differ from that of

the petitioner, Dionne Staples, and which might not be presented in its entirety in the petitioner's brief. Therefore, NFHA and the Center respectfully move for leave to file a brief with the Court, as *amici curiae*, to demonstrate that this issue merits review on certiorari.

QUESTIONS PRESENTED

1. Does a federal court of appeals err when it interprets the Fair Housing Amendments Act, 42 U.S.C. § 3601 *et seq.*, to include a twelve month limit on the accrual of damages for a claim filed in an administrative proceeding?

2. Does a federal court of appeals exceed its permitted scope of review under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, when it reduces an administrative law judge's finding of actual damages without showing that the finding was unsupported by substantial evidence on the record as a whole?

3. Does a federal court of appeals exceed its permitted scope of review under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, when it reduces an administrative law judge's award of remedial damages in order to shift the cost of an administrative delay from the discriminators to the person aggrieved by an act of unlawful discrimination?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Dionne Staples, the respondents Michael P. Kelly and John T. Kelly, and the Secretary, United States Department of Housing and Urban Development.

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I. The Sixth Circuit's decision to impose a twelve month limit on the accrual of damages, and to reduce the actual damages awarded in an administrative proceeding, because the Department of Housing and Urban Development failed to comply with the time limits set forth in the Fair Housing Amendments Act, conflicts with that Act and with decisions of other Circuits applying the Administrative Procedure Act. . . 10

II. The Sixth Circuit's decision to reduce the actual damages awarded in an administrative proceeding, because the Department of Housing and Urban Development failed to comply with the time limits set forth in the Fair Housing Amendments Act, conflicts with a decision of this Court applying the Administrative Procedure Act. 15

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IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1996

DIONNE STAPLES, *Petitioner*,

v.

MICHAEL P. KELLY and
JOHN T. KELLY, *Respondents*.

BRIEF OF *AMICI CURIAE* THE NATIONAL FAIR HOUSING ALLIANCE AND TOLEDO FAIR HOUSING CENTER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The National Fair Housing Alliance and The Fair Housing Center, Toledo, Ohio, as *amici curiae*, respectfully urge that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 30, 1996 (petition for rehearing and suggestion for rehearing *en banc* denied January 24, 1997).

INTERESTS OF THE *AMICI CURIAE*

The National Fair Housing Alliance, Inc. (NFHA) is a non-profit corporation organized under the laws of Virginia that represents private fair housing centers throughout the United States. NFHA's purpose is the achievement of "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. §3601. It attempts to fulfill this purpose by conducting research into the nature and effects of housing discrimination, advocating for effective programs of fair housing compliance enforcement, and sponsoring national education conferences on fair housing issues and fair housing litigation. NFHA also attempts to identify and eliminate housing practices that are discriminatory and that constitute barriers to equal access to housing. NFHA has a direct interest in the construction and application of federal statutes protecting against discrimination in housing. To this end, NFHA seeks leave to participate as *amicus curiae* in those cases that involve important interpretations of fair housing laws.

The Toledo Fair Housing Center (the Center) is an operating member of the National Fair Housing Alliance. Organized in 1975, the Center is a private, nonprofit organization that works to eliminate practices of housing discrimination and to expand equal housing opportunities in Northwestern Ohio. The Center is a leader in fair housing enforcement and litigation. Its staff has conducted workshops for fair housing organizations, government agencies, and housing industry professionals. The Center is regularly called upon by Congress to submit testimony regarding discriminatory housing practices. Like NFHA, the Center has a direct interest in the construction and application of the Fair Housing Act.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit for which *amici* urge review on certiorari is reported at 97 F.3d 118. The first opinion of the Sixth Circuit in this matter, which is also relevant, is reported at 3 F.3d 951. The initial decision and initial decision on remand of the Department of Housing and Urban Development, Office of Administrative Law Judges, have not been reported. These opinions and decisions are attached as appendices to the Petition for Writ of Certiorari filed by petitioner Dionne Staples.

JURISDICTION

Invoking the jurisdiction of the Court of Appeals for the Sixth Circuit under 42 U.S.C. § 3612(i), the Kellys appealed the judgment of the Department of Housing and Urban Development, Office of Administrative Law Judges, in its decision on remand from a previous appeal. See Pet'r Br., pp. A2 and B17. In a judgment decided September 30, 1996 the Sixth Circuit reversed and modified the damage award made by the administrative law judge. See Pet'r Br., p. A2. The Secretary of the Department of Housing and Urban Development and petitioner Dionne Staples each filed a petition for rehearing and suggestion for rehearing *en banc* that the court denied on January 24, 1997. See Pet'r Br., p. E109-110.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

...

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

42 U.S.C. § 3610. Administrative enforcement; preliminary matters

(a) Complaints and answers

(1)(A)(i) An aggrieved person may, not later than one year after an alleged discriminatory housing practice has occurred or terminated, file a complaint with the Secretary alleging such discriminatory housing practice. The Secretary, on the Secretary's own initiative, may also file such a complaint.

...

(g) Reasonable cause determination and effect

(1) The Secretary shall, within 100 days after the filing of the complaint ...,determine based on the facts whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, unless it is impracticable to do so, or unless the Secretary has approved a conciliation agreement with respect to the complaint. If the Secretary is unable to make the determination within 100 days after the filing of the complaint ...,the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so.

(2)(A) If the Secretary determines that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Secretary shall, except as provided in subparagraph (C), immediately issue a charge on behalf of the aggrieved person, for further proceedings under section 3612 of this title.

42 U.S.C. § 3612. Enforcement by the Secretary

(b) Administrative law judge hearing in absence of election

If an election is not made under subsection (a) of this section with respect to a charge filed under section 3610 of this title, the Secretary shall provide an opportunity for a hearing on the record with respect to a charge filed under section 3610 of this title. The Secretary shall delegate the conduct of a hearing under this section to an administrative law judge appointed under section 3105 of Title 5. The administrative law judge shall conduct the hearing at a place in the vicinity in which the discriminatory housing practice is alleged to have occurred or to be about to occur.

...

(g) Hearings, findings and conclusions, and order

...

(3) If the administrative law judge finds that a respondent has engaged or is about to engage in a discriminatory housing practice, such administrative law judge shall promptly issue an order for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief. Such order may, to vindicate the public interest, assess a civil penalty against the respondent--

...

(i) Judicial review

(1) Any party aggrieved by a final order for relief under this section granting or denying in whole or in part the relief sought may obtain review of such order under chapter 158 of Title 28.

(2) Notwithstanding such chapter, venue of the proceeding shall be in the judicial circuit in which the discriminatory housing practice is alleged to have occurred ....

STATEMENT OF THE CASE

On March 5, 1990 petitioner Dionne Staples inquired about an apartment that respondents offered for rent and was told that she did not qualify for the rental because she had too many children. On May 17, Ms. Staples filed a complaint with the Department of Housing and Urban Development (HUD) alleging that respondents had violated the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* HUD investigated the complaint and decided there was reasonable cause to believe that discriminatory acts had taken place. During 1990, HUD made several offers to conciliate the complaint. On March 2, 1992 HUD issued a Charge of Discrimination against the respondents. An oral hearing was held May 27-29, 1992.

On August 26, 1992 the administrative law judge issued an initial decision. The judge found that Ms. Staples had suffered economic damages of $6,930.76,which consisted of increased alternative housing costs and associated transportation costs. The judge also found that Ms. Staples had suffered $3,500 in actual intangible damages for emotional distress and for the loss of the features of the rental property that were of particular and uncommon value to her. Finally, the judge decided against

imposing a civil penalty, in part because HUD had failed to present the case for adjudication during the time period contemplated by the Act while Ms. Staples's economic damages had continued to accrue after that period had elapsed. See Pet'r Br., pp. C61, C76-78.

Respondents appealed. In its first review of the administrative order, the Sixth Circuit expressed strong dissatisfaction with what it considered to be procedural lapses and inadequate conciliation efforts on the part of HUD. Although upholding the administrative law judge's finding of discrimination, and noting that the judge had taken HUD's delay into account by declining to assess a civil penalty, the court vacated the judge's award of actual damages and remanded the case to the Department for further conciliation. If conciliation were to fail, the court directed the administrative law judge to reconsider his opinion, directing that "in no case should damages be assessed for the period during which HUD completely neglected this case." See Pet'r Br., p. B34.

Conciliation failed. Upon remand,the administrative law judge determined that only economic damages were at issue because the remaining damages, which represented emotional distress and loss of housing opportunity, would have occurred no matter when the hearing took place. Seeking to apply the Sixth Circuit's directive that no damages should be assessed for any period in which HUD "completely neglected" the case, the judge tried to determine whether the Sixth Circuit intended to apply the time limits of the Fair Housing Amendments Act as a limitation on the accrual period for damages. Examining the text of the Act, the judge noted that it required HUD to issue a Charge of Discrimination within 100 days of the filing of the complaint "unless it is impracticable to do so." 42 U.S.C. § 3610(g). The judge reasoned that this period

could not be a limit on the accrual period for damages, because the Act contemplated situations in which compliance would be "impracticable." See Pet'r Br., pp. D92-98.

The judge also observed that HUD, in its regulations, had construed "impracticable" to include situations where the size of the overall caseload prevented timely processing of a case. Citing to this Court's decision in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 107 (1979) for the proposition that HUD's regulatory interpretation of the Act "commands considerable deference" because HUD has primary responsibility for administering the Act, the judge found HUD's construction of "impracticable" to be reasonable and permitted by the statute. Noting that HUD had argued on remand that the size of its caseload prevented timely processing of the case, the judge determined that the situation could fit within the "impracticable" exception to the Act's time limits. See Pet'r Br., pp. D94-95. The judge also noted that if he were to interpret those time limits to prohibit accrual of damages after 100 days, respondents would gain a windfall, because they had already escaped imposition of a civil penalty due to those same delays. After carefully reexamining the record, the judge found that he could not identify any period during which HUD had "completely neglected" the case, and therefore reduced the damages award by a nominal $1.

Respondents appealed again. Without any discussion of the facts or citation to the record, the Sixth Circuit reduced the accrual period for Ms. Staples' economic damages to twelve months, which it deemed to be "the period within which Congress intended HUD to carry out its administrative responsibilities." See Pet'r Br., p. A6. The court also reduced Ms. Staples' damages for

emotional distress and loss of housing opportunity despite the administrative law judge's finding that those damages did not depend on an accrual period.

REASONS FOR GRANTING THE WRIT

I.

The Sixth Circuit's decision to impose a twelve month limit on the accrual of damages, and to reduce the actual damages awarded in an administrative proceeding, because the Department of Housing and Urban Development failed to comply with the time limits set forth in the Fair Housing Amendments Act, conflicts with that Act and with decisions of other Circuits applying the Administrative Procedure Act.

When it enacted the Fair Housing Amendments Act of 1988, Congress sought to "fulfill the promise made ... by the enactment of title VIII of the Civil Rights Act of 1968." H.R. Rep. No. 711, 100th Cong., 2d Sess. 38, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2174. Congress recognized that the 1968 Act failed to provide an effective enforcement mechanism that would make its proscription of discriminatory housing practices a reality. *Id.*

To correct that shortcoming, Congress created an administrative enforcement system that empowered the Department of Housing and Urban Development to bring a discriminatory housing practice case to a hearing before an administrative law judge. *Id.* at 2174, 2178. Congress provided that the hearing would be conducted on the record, in accordance with the Administrative Procedure

Act. 42 U.S.C. § 3612(b); H.R. Rep. No. 711, 100th Cong., 2d Sess. 38, *reprinted in* 1988 U.S.C.C.A.N.2173, 2197. If the hearing shows that the respondent had engaged in a discriminatory housing practice, the Fair Housing Amendments Act requires the administrative law judge to promptly issue an order for appropriate relief. 42 U.S.C. § 3612(g)(3). If the aggrieved person suffered actual damages, the order must include an award of actual damages in the amount proven.[1] In the administrative law judge's discretion, the order could also assess a civil penalty against the respondent.

Once the order becomes final, the Act permits an appeal to the court of appeals for the judicial circuit in which the discriminatory housing practice allegedly occurred. 42 U.S.C. § 3612(i). Congress intended the order and the scope of appeal to be governed by the Administrative Procedure Act, under which the court of appeals could not set aside findings of fact unless they were unsupported by substantial evidence on the record taken as a whole. H.R. Rep. No. 711, 100th Cong., 2d Sess. 38, *reprinted in* 1988 U.S.C.C.A.N.2173, 2199; see also *HUD v. Blackwell*, 908 F.2d 864, 870 n.2 (11th Cir.

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[1] The literal terms of the Fair Housing Amendments Act provide that the order "may include actual damages suffered by the aggrieved person." 42 U.S.C. § 3612(g)(3). Prior to its amendment, similar language in the Fair Housing Act provided that a court "may award to the plaintiff actual damages." *Curtis v. Loether*, 415 U.S. 189, 190-91 (1974), *quoting* Section 812 of the Civil Rights Act of 1968. Interpreting that language, this Court determined that an award of actual damages was not discretionary: "if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount." *Id.* at 198.

1990); 5 U.S.C. § 706.[2] Like a finding of unlawful discrimination, the determination of actual damages is a question of fact that is reviewed in accordance with the "substantial evidence" standard. *Morgan v. HUD*, 985 F.2d 1451, 1458 (10th Cir. 1993); *HUD v. Blackwell*, 908 F.2d 864, 872-73 (11th Cir. 1990).[3]

The Sixth Circuit's decision below conflicts with the Administrative Procedure Act and decisions of this Court and other Circuits and threatens to disrupt the entire system of administrative enforcement that Congress established in the Fair Housing Amendments Act. Under the Administrative Procedure Act and applicable precedent, an administrative award of actual damages must be upheld if it is supported by substantial evidence. Substantial evidence is "such relevant evidence as a

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[2] Each court of appeals that has considered the issue has determined that administrative adjudications of Fair Housing Act claims must be reviewed in accordance with the deferential standards of the Administrative Procedure Act. See, e.g., *Kormoczy v. HUD*, 53 F.3d 821, 823 (7th Cir. 1995); *Morgan v. HUD*, 985 F.2d 1451, 1457 (10th Cir. 1993), also citing *Arkansas v. Oklahoma*, 503 U.S. 91, 112-13 (1992); *Soules v. HUD*, 967 F.2d 817, 821-22 (2nd Cir. 1992); *HUD v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990). The Court of Appeals for the Sixth Circuit appears to have implicitly recognized this standard of review. See *Baumgardner v. HUD*, 960 F.2d 572, 579 (6th Cir. 1992).

[3] Apart from awarding actual damages, agencies are given considerable latitude in the selection of other remedial measures. This Court has held that an agency's selection of remedy should not be overturned unless it is either "'unwarranted in law or ... without justification in fact.'" *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 185-86 (1973), quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 112-13 (1946). See also *Bluestone Energy Design, Inc. v. FERC*, 74 F.3d 1288, 1294 (D.C. Cir. 1996) (following *Butz*).

reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). As this Court recently declared, a reviewing court may not "supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence." *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992). Yet despite the clarity of this command, in its review of the administrative law judge's findings in the case below, the Sixth Circuit arbitrarily limited the accrual period of damages to twelve months. Judge Ryan strongly dissented, stating "[t]here is absolutely nothing in the record to support 'twelve months' as the appropriate period for a damage award and, to its credit, the majority does not claim there is any record support for what it has done." See Pet'r Br., p. A13.

The Sixth Circuit justified its disregard of the factual record and the administrative finding of damages by stating, apparently as a legal conclusion, that twelve months is "the period within which Congress intended HUD to carry out its administrative responsibilities." See Pet'r Br., p. A6. That statement is incorrect. Congress did specify that HUD, or an aggrieved person seeking administrative enforcement by HUD, must file a *complaint* within twelve months of the occurrence or termination of a discriminatory housing act. 42 U.S.C. § 3610(a)(1)(A)(i). But Congress also specified that HUD would have continued administrative responsibilities after that twelve month period: for example, unless impracticable, HUD was expected to make a reasonable cause determination within 100 days after the filing of the complaint and, if warranted, to issue a charge of discrimination to institute adjudicatory proceedings. 42 U.S.C. § 3610(g)(1).

Moreover, the statutory language does not command that proceedings must be instituted within a fixed time. Rather, it permits HUD to extend the time for filing a charge if earlier action would be "impracticable." In its regulations, HUD has construed this exception to include situations where the size of its overall caseload prevented timely processing of a case. 24 C.F.R. Subtitle B, Ch. I, Subch. A., App. I (1994) (discussion of § 103.225, *Completion of investigation*, in the final rule implementing the Fair Housing Amendments Act of 1988). As this Court has emphasized, HUD's regulatory interpretation of the Fair Housing Act "commands considerable deference" because HUD has primary responsibility for administering the Act. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 107 (1979).

By interpreting the Act to require administrative disposition of claims within twelve months, the Sixth Circuit completely disregarded HUD's prior interpretation of the Act, which permitted proceedings to be deferred when earlier adjudication would be impracticable due to HUD's overall caseload. In so doing, the court exceeded its allowed scope of judicial review under the Administrative Procedure Act and impermissibly interfered with HUD's administrative discretion.

More importantly, by interpreting the Act to prohibit accrual of damages in an administrative proceeding after twelve months, the Sixth Circuit created new law that conflicts with the purposes of the Fair Housing Amendments Act.[4] To obtain the protection of

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[4] The insupportability of the court's imposition of a twelve-month accrual period is reinforced by the fact that Congress provided for a *longer* statute of limitations in the Fair Housing Amendments (continued...)

a two year statute of limitations and avoid the prospect of reductions in damages due to administrative delays, private fair housing centers will therefore need to counsel aggrieved persons to bypass the Act's administrative forum and have their claims judicially determined instead. This result directly contravenes Congress' purpose in enacting the Fair Housing Amendments Act.

II.

The Sixth Circuit's decision to reduce the actual damages awarded in an administrative proceeding, because the Department of Housing and Urban Development failed to comply with the time limits set forth in the Fair Housing Amendments Act, conflicts with a decision of this Court applying the Administrative Procedure Act.

The Sixth Circuit stated that its reduction of the actual damages awarded by the administrative law judge "follow[ed] the mandate" of the first *Kelly* appellate decision: "that a respondent in a housing discrimination case cannot be made to pay for the government's neglect."

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[4](...continued)
Act, increasing the time for a private person to file a complaint from 180 days to two years and for HUD to file a complaint from 180 days to one year. 42 U.S.C. § 3613(a)(1)(A); H.R. Rep. No. 711, 100th Cong., 2d Sess. 38, reprinted in 1988 U.S.C.C.A.N.2173, 2194, 2200. Compare *Marshall v. Sun Oil Co.*, 605 F.2d 1331, 1339 (5th Cir. 1979) (interpreting the ADEA; "If Congress had thought a time lag of nineteen months to be unfair, it could have shortened the time for bringing an action under the Act").

See Pet'r Br., pp. A5-A6. That "mandate" squarely conflicts with this Court's decision in *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969).

In *Rutter-Rex*, this Court considered whether an administrative agency had the discretion, under the Administrative Procedure Act, to require a respondent to bear the cost of increased restitution caused by the agency's delay. *Id.* at 264-65. Finding that the agency did have such discretion, this Court noted that the agency "could properly determine that back pay is ... a remedy designed to restore, so far as possible, the status quo that would have obtained but for the wrongful act," and concluded that "the Court of Appeals exceeded the narrow scope of review provided for the [agency's] remedial orders when it shifted the cost of the delay from the company to the employees in this case." *Id.* at 265-66.

In the present case, the administrative law judge plainly acted within the scope of agency discretion under *Rutter-Rex* when he decided to award remedial damages for the period that began with Dionne Staples' economic injury and ended with the hearing, but declined to assess a civil penalty in order to offset the increased damages respondents owed because the hearing did not occur within the time indicated in the Fair Housing Amendments Act. In so ruling, the judge fulfilled the purpose of the Fair Housing Act; namely, to ensure that a person wronged by unlawful discrimination obtained a judgment for actual damages. See *Curtis v. Loether*, 415 U.S. 189, 197 (1974). As this Court has said elsewhere, "the relation of remedy to policy is peculiarly a matter for administrative competence." *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 185-86 (1973), quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 112-13 (1946).

By exceeding its permitted scope of review and imposing upon the text of the Fair Housing Amendments Act a novel and insupportable accrual period for damages, the Sixth Circuit has created a precedent that undermines the very purposes of the Act and directly conflicts with this Court's ruling in *Rutter-Rex*. Apart from being "an unedifying exercise in unrestrained judicial power," see Pet'r Br., p. A20, the Sixth Circuit's opinion in this case is the first opinion to address the problem of administrative delay under the Act. As a decision of first impression, it is likely to be followed by other Circuits that may well be confronted with similar instances of delay.[5] Plenary consideration of the matter by the Court is therefore essential.

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[5] In a 1993 article on the subject, Professor Leland Ware noted that "[t]he addition of two new protected categories ...has resulted in a considerable increase in HUD's caseload [and has] slowed the processing of fair housing complaints to such an extent that only a fraction are processed within the one hundred day maximum allotted by the statute." Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 Admin. L.J. Am. U. 59, 63 (1993).

CONCLUSION

For the reasons set forth above, the petition for certiorari of Dionne Staples should be granted.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

DIONNE STAPLES,
Petitioner,

v.

MICHAEL P. KELLY, JOHN T. KELLY, and the Secretary, United States Department of Housing & Urban Development,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a circuit court of appeals reviewing a decision of an Administrative Law Judge in a proceeding arising under the Fair Housing Act and amendments thereto must adopt a decision of an Administrative Law Judge that fails to address agency delay, misconduct, due process violations, obstruction of justice and perjured testimony.

2. Whether a circuit court of appeals reviewing a decision of an Administrative Law Judge in a proceeding arising under the Fair Housing Act and amendments thereto must ignore agency misconduct, delay, due process violations, obstruction of justice and perjured testimony.

3. Whether a circuit court of appeals has authority to make a decision consistent with a prior mandate of the Court of Appeals or is required to adopt findings of an Administrative Law Judge that violates the mandate.

PARTIES TO THE PROCEEDING

Petitioner is Dionne Staples, an individual.

Respondents are Michael P. Kelly, an individual, John T. Kelly, an individual, and The Secretary of Housing and Urban Development.

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Respondents Michael P. Kelly and John T. Kelly respectfully urge this Court to deny the Petition for Writ of Certiorari filed in this action by Dionne Staples.

OPINIONS BELOW

Petitioner Staples seeks a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit reported at 97 F.3d 118 (6th Cir. 1996) (Petitioner's Appendix A), which reversed the Initial Decision on Remand as to damages, affirmed an award of attorney fees in the sum of Thirty Thousand Six Hundred Fifty-two and 46/100 Dollars ($30,652.46) plus Two Hundred Sixty-two and 46/100 Dollars ($262.46) to Staples and reversed the denial of fees to the Respondents, Kellys. Additionally the Administrative Law Judge issued a decision on attorney fees dated September 21, 1995 that was timely appealed to the United States Court of Appeals for the Sixth Circuit reported at 97 F.3d 118 (6th Cir. 1996)(Respondents App. A). An initial decision of the Administrative Law Judge dated August 26, 1992 concerning the same parties on the same underlying facts with the exception of attorney fees was appealed to the Court of Appeals for the Sixth Circuit and was affirmed in part, vacated in part and remanded for further proceedings and is reported at 3 F.3d 951 (6th Cir. 1993). (Petitioner's Appendix B)

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 1996. Staples and the Secretary of Housing and Urban Development filed petitions for rehearing and suggestion for rehearing en banc (Petitioners' Appendix G). The Petition and Suggestion for Rehearing en Banc were denied on January 24, 1997 (Petitioners' Appendix E).

The Petitioner alleges the Court has jurisdiction pursuant to 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are the Fair Housing Act as amended, 1988, 42 U.S.C. §§3601-19 and 24 CFR 103.1 through and including 24 CFR 104.590. Selected portions of 42 U.S.C. are reproduced and included in Respondents' App. E. Selected portions of 24 CFR are reproduced and included in Respondents' App. F.

STATEMENT OF THE CASE

Respondents Michael P. Kelly and John T. Kelly respectfully oppose Staples' petition for a writ of certiorari. The petition is an exercise in creative writing that is short on facts and long on emotion. Respondents are compelled to set forth the facts as Petitioner's is inaccurate.

FACTS:

The Petitioner allegedly made a phone call on March 5, 1990, to inquire about the availability of an apartment. Petitioner never viewed the apartment or went to the apartment and does not know with whom she spoke. Petitioner's sole observation of the apartment was from a bus window. Petitioner perceived that she was denied the apartment after a short phone conversation. Petitioner sought the assistance of Housing Opportunities Made Equal, Inc. (HOME), a local fair housing agency. The individual from HOME limited her investigation to asking Petitioner with whom she spoke. Based on the foregoing, HOME filed a complaint on behalf of Staples with HUD on May 19, 1990, that was filled with incorrect information.

HUD received the Staples complaint and sent it to an investigator, Charles Jung, who is assigned to HUD's Cincinnati office. This administrative assignment compounded HOME's error ridden complaint and commenced a series of violations by HUD of its own regulations, the Fair Housing Act, the criminal code and due process rights of Michael P. Kelly and John T. Kelly.[1] The full extent of HUD's noncompliance with the Fair Housing Act and the

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[1] James Wm. Kelly who was initially named as a discriminator in the second amended complaint filed November 1990 was never served with a complaint or contacted by Jung and was dismissed by the Administrative Law Judge as a party.

incompetence of HUD in dealing with Michael P. Kelly and John T. Kelly undermined every procedural safeguard in the Fair Housing Act, Congressional intent in the administration of the Fair Housing Act and deprived HUD of jurisdiction of the complaint.

HUD AND INVESTIGATOR JUNG:

A. **Service of Complaints**

HUD served Respondent Michael P. Kelly with the initial complaint at Michael P. Kelly Realty but never served the amended complaint or second amended complaint on him. John T. Kelly was never served with the initial complaint, amended complaint or the second amended complaint in compliance with the Fair Housing Act or HUD regulations. The second amended complaint was never served on James Wm. Kelly, who was alleged to be a discriminator, but he was subsequently dismissed as a party. In fact, the second amended complaint naming James Wm. Kelly as a discriminator was filed one month after Jung completed his investigation in this matter.

Jung never contacted Respondent Michael P. Kelly by phone or in person during the course of his investigation. Respondent Michael P. Kelly contacted Jung once concerning the complaint. While allegedly investigating the Staples' complaint, Jung arranged conciliation where Jung served as investigator and conciliator in violation of HUD regulations. Respondent Michael P. Kelly, Dionne Staples and representatives from HOME attended the conciliation. Respondent John T. Kelly attended the conciliation session with his brother Michael, but John T. Kelly was not aware that he was named as a discriminator at the time of the meeting and never received notice that he was named in a

complaint until August 1990.[2]

At the conclusion of the July 1990 conciliation meeting, Jung took the information provided in conciliation, that Jung never verified, and filed an amended complaint against Michael P. Kelly and John T. Kelly. Jung's use of information obtained in conciliation to file an amended complaint is in violation of HUD regulations and the Fair Housing Act. The notice of the filing of the amended complaint served by Jung on John T. Kelly did not meet the minimal requirements required by the Fair Housing Act concerning conciliation and the rights of the purported discriminator. Jung never served Michael P. Kelly with the first amended complaint.

When John T. Kelly received the amended complaint approximately two weeks after conciliation, he decided Jung was either incompetent or dishonest or both. John T. Kelly's impression of Jung proved accurate. John T. Kelly sent a response to HUD's Chicago Regional Office bypassing Jung. Jung failed to investigate any of the Staples' complaints in compliance with the Fair Housing Act, and under the guise of conciliation, used the information obtained in conciliation against the Kellys. It was obvious Jung could not be trusted, and the level of his incompetence is demonstrated in his trial testimony and observations of the Administrative Law Judge.

Jung never attempted to determine if service was made on Michael P. Kelly or John T. Kelly in compliance with the Fair Housing Act or HUD regulations even though he was the assigned investigator, because he alleged at trial it was not his job. Jung never spoke to any of HOME's testers during the

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[2] John T. Kelly was a co-owner of the apartment building in question and attended the conciliation at Michael P. Kelly's request. Petitioner makes reference to conciliation attempts by Jung (Petitioner's Appendix H 137-140), but John T. Kelly was not even served or notified of the complaint against him or his right to conciliation until August 1990.

course of his investigation. Jung spent a total of 20-25 minutes with Staples concerning her original complaint and two amended complaints which he testified at trial to being his normal investigative technique. Jung uses the local building or health code to determine a violation of the Fair Housing Act concerning familial status discrimination, but he does not have a complete copy of the local Cincinnati Basic Building Code relevant to the subject property. Jung has no idea of the responsibilities of property owners and believes the owner could be issued a condemnation order if the Building Code is violated, however he doesn't know what a condemnation order is.

Staples doesn't know with whom she spoke on March 5, 1990, and Jung never bothered to find out. Both HOME and Jung testified that it is important to determine who the complainant spoke to on March 5, 1990, but neither HOME nor Jung attempted to determine the identify of the individual. None of the witnesses could identify Michael P. Kelly or John T. Kelly as the individual who refused to rent, deal or negotiate for the rental of 6300 Montgomery Road.

The Kellys responded to Jung's request for information in September 1990, but they could not deal with him, because, due to his actions after conciliation, they believed him to be incompetent and deceitful. Jung completed his investigation on October 2, 1990. Jung didn't tell the Kellys the investigation was completed and, in fact, did not contact the Kellys after September 1990. The Kellys never received any correspondence concerning Staples' complaint after September 1990 from HUD or anyone else until March 1992. Staples wasn't contacted by HUD from October 2, 1990 until March 1992.

THE REASONABLE CAUSE DETERMINATION:[3]

HUD served the reasonable cause determination on Michael P. Kelley and James Wm. Kelly at 2147 St. James Place, Cincinnati, Ohio.[4] After two years, HUD still couldn't serve documents in compliance with the Fair Housing Act or even spell the parties' names correctly. Subsequent attempts at service eventually reached Michael P. Kelly and John T. Kelly. Answers were filed on behalf of Michael P. Kelly (Respondents' App. G) and John T. Kelly (Respondents' App. G). Respondents Michael P. Kelly and John T. Kelly conducted discovery and filed Motions to Dismiss (Respondents' App. H). The Motions to dismiss were overruled. (Respondents' App. H)

Respondents attempted to subpoena Jung's superiors to testify concerning Jung's actions and HUD's compliance with its regulations and the Fair Housing Act. The agency's Administrative Law Judge quashed the request for subpoenas and spared Jung's superiors from cross-examination.

THE TRIAL:

The trial was remarkable as not one witness could identify Michael P. Kelly or John T. Kelly as the individual who spoke to Staples. Jung was exposed as an incompetent who repeatedly violated the Fair Housing Act and HUD regulations at the expense of Respondents' rights. HUD trial counsel was exposed for answering and signing

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[3] Neither the Kellys nor Staples were represented by counsel prior to the issuance of the reasonable cause determination. Morgan served as general counsel for HOME during all or a portion of these proceedings.

[4] Ironically, although Michael, John and James Kelly are brothers, HUD added an extra "e" to Michael and John's last name while spelling James' last name with one "e."

interrogatories under oath that Jung purportedly answered but in fact never saw until trial. Against this backdrop of HUD duplicity and incompetence, the Administrative Law Judge held that the liability finding in this case was not based on Jung's credibility. Even the Administrative Law Judge found Jung, his investigation and HUD's handling of the complaints completely unreliable and incredulous.

The Kellys presented testimony that they rented to families with two children before the Fair Housing Act was enacted and after it was amended in 1988. The Kellys testified that they attempted to comply with the local occupancy code. The code enforcement official and the Director of Buildings and Inspections of Cincinnati both testified that occupancy laws are enforced. Nonetheless, the Administrative Law Judge ruled in favor of Staples and ordered a damage award and a plethora of enforcement mechanisms for which there is no justification in the record.[5]

THE FIRST APPEAL:

The Kellys appealed and Staples cross appealed, and the case proceeded to the Sixth Circuit. The Kellys believed the decision of the Administrative Law Judge was erroneous and Staples wanted more money. As Judge Lively stated at oral argument, the Sixth Circuit had to bail HUD out again. The Kellys' due process rights were dashed at the expense of protecting HUD. The Sixth Circuit vacated the damage award with the instruction that damages shall not be assessed during the period the case was completely neglected by HUD. The case was remanded with instructions not to award damages for the period of time HUD completely neglected the case and that the parties should attempt conciliation with a

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[5] Petitioner's brief makes a reference to race discrimination, however, Ms. Staples testified that both Jung and HOME informed her there was no basis for the race complaint.

competent, unbiased conciliator.[6]

INITIAL DECISION ON REMAND:

The remand of the case to the same Administrative Law Judge was an exercise in futility based upon the issuance of the Administrative Law Judge's order (Respondents' App. D). It was soon apparent that any submission to the Administrative Law Judge was strictly a formality, because the Administrative Law Judge's order in response to the Sixth Circuit's decision forecast exactly what the Administrative Law Judge's decision would be on remand. After finding that Jung lacked credibility, that HUD counsel had filed false interrogatories under oath and that HUD was indifferent to the Fair Housing Act, the Administrative Law Judge found that there was no period of complete neglect. Essentially the Administrative Law Judge found that even though the case was built on quicksand, HUD dispatched its duties, and the award was reduced by One Dollar, required payment of interest and extended reporting requirements. The decision amounted little more than vendetta justice.

THE ATTORNEY FEES:

Upon receipt of the initial decision on remand, Staples' counsel filed a petition for fees. The Kellys' counsel also filed a petition for fees. The Administrative Law Judge awarded fees to Staples' counsel in the sum of Thirty Thousand Six Hundred Fifty-two and 46/100 Dollars ($30,652.46)(Respondent's App. A). The Kellys' fee petition

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[6] Conciliation after the decision on the first appeal to the Sixth Circuit was an exercise in futility, as the demands were exorbitant, and the HUD conciliators were ineffectual five years after the date conciliation should have occurred.

was denied.[7] Neither Staples' counsel nor Kellys' counsel was involved in this case until after the Probable Cause Determination was issued in March 1992 or twenty-one months after the case was required to be concluded. The appearance of counsel was after the twelve-month period in the Court's decision in Kelly II.

THE SECOND APPEAL:

On appeal, the Sixth Circuit reduced Staples' damage award rather than finding that HUD completely neglected the case from Day One and lacked jurisdiction. Rather than address the due process violations and HUD's complete neglect and enforce the law as written, the Court gave Staples a compensatory damage award, an award of attorney fees almost seven times what Staples received and awarded the Kellys $20,000.00 in fees and expenses for the pursuit of their appeal rights before an agency that would not comply with its own regulations and rules; that persistently and repeatedly attempted to circumvent justice; that adamantly displayed a cavalier attitude toward the due process rights of the Kellys; that, with feckless abandon, attempted to exacerbate damages and alienate the parties; and that, even in the world of bureaucratic red tape, elevated the definition of "complete neglect" to a new high. HUD was an agency run amok.[8]

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[7] Although Judge Ryan stated in his dissent that the Kellys did not file a fee petition, it was included in the joint appendix and in the record filed with the Sixth Circuit.

[8] Kellys offered payment to Staples and notified Morgan that arrangements were being made to pay his fees. Morgan never responded to the Kellys' offer of payment. Delay in payment does not lie with the Kellys but with the nonresponse by Petitioner's counsel to assert an emotional appeal that everyone is paid except Staples and Morgan.

REASONS FOR DENYING THE WRIT:

A. The Petitioner's Appeal is Time Barred.

The Petitioner through its petition seeks to have this Court review a decision from August 27, 1993. Kelly v. HUD, 3 F.3d 951 (6th Cir. 1993) (Kelly I) The initial decision of the Sixth Circuit in Kelly I made it abundantly clear that the Petitioner's damage award would not stand and that HUD violated the Fair Housing Act. Id. at 954. The Sixth Circuit, once again, was required to bail out HUD. It is abundantly clear that the calculation of the Petitioner's damages would not accrue during any period that HUD completely neglected the case. Id. at 958. In the event that Petitioner wanted to challenge the complete neglect standard imposed in Kelly I, the Petitioner should have appealed. Obviously HUD and Staples had no problems with the "complete neglect" standard in Kelly I, as they did not appeal the decision in Kelly I.

The original panel in Kelly I adopted a "completely neglected" standard for the accrual of damages when HUD failed so miserably to comply with the Fair Housing Act. The panel majority in Kelly v. HUD, 97 F.3d 118 (6th Cir. 1996) (Kelly II), limited damages to a twelve-month accrual period under the facts of this case while the dissenting member ignored the facts and did not review the record in

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Further, Petitioner alleges this case languished in the Sixth Circuit when in fact the Court had three appeals before it: (1) Kellys' appeal, (2) Petitioner's appeal of One Dollar reduction in damages, and (3) The issue of attorney fees. All appeals were consolidated in one decision. Petitoner's counsel also failed to mention his request to extend time to file Petitioner's brief.

this matter or the appendices filed.[9] The panel majority in Kelly II enforced the decision in Kelly I. The time for Petitioner to appeal, if she did not accept the completely neglected standard, was at the conclusion of Kelly I.

B. Decision in Kelly II Does Not Conflict with N.L.R.B. v. Rutter Rex or Curtis v. Loether.

The Petitioner has repeatedly asserted the argument that not only Kelly II but also Kelly I are violative of or in conflict with N.L.R.B. v. J. H. Rutter Rex Manufacturing Co., 396 U.S. 258 (1969). The simple answer is that Rutter Rex involved an administrative complaint and subsequent charge that was: (a) timely filed; (b) served on the correct parties; (c) served in compliance with law; (d) promptly investigated; and (e) brought to trial in a timely manner and adjudicated. This case involves an administrative complaint that was filed on behalf of Staples by HOME. Staples chose HOME as her representative. The complaint prepared by HOME contained incorrect information. A time lapse of twenty-two months occurred between the complaint and the probable cause charge. More than nineteen months elapsed from the time HUD was required to act until it did act. HUD simply let the time lapse for the issuance of a charge against the Kellys. It is a jurisdictional limitation.

In Rutter Rex, the parties were aware that an adjudication order was issued within the time limits and liability attached. The issue in Rutter Rex became a collection issue based on a timely filed complaint after a

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[9] Judge Ryan explains in detail that the Kellys didn't file an application for fees. The fee application was included in the joint appdendix filed in the Sixth Circuit and was apparently overlooked by Judge Ryan, his clerk or both.

hearing was held and a determination was reached. In this proceeding, HUD permitted the time to lapse within which it had jurisdiction to issue a Probable Cause Determination and to make a liability determination. HUD's actions in this case were time barred, unlike Rutter Rex.

N.L.R.B. v. Ironworkers, 466 U.S. 720 (1984) cited by Petitioner, is factually similar to Rutter Rex and not to this case. Much the same as Rutter Rex, the claims in Ironworkers were not time-barred. The claims were timely asserted and adjudicated. There was no assertion of incompetence, corruption, violation of agency regulations, an Act of Congress or a time-barred action by an Administrative Law Judge in Rutter Rex or Ironworkers. Both cases are enforcement actions of a judgment timely and lawfully obtained. In this case, the Court is dealing with an agency that lost jurisdiction to adjudicate the matter through sheer indifference or knowing violation of its regulations and the Fair Housing Act.

Curtis v. Loether, 415 U.S. 189 (1974) is also inappropriate to this proceeding. Once again a court must have jurisdiction to hear the case. If the case is barred by the terms of the statute, it must be dismissed. Hallstrom v. Tillamook County, 493 U.S. 20, 31 (1989). The language of the Fair Housing Act is clear concerning HUD's obligations regarding investigation and notice. Even HUD's own regulations specify time limits. 24 CFR 103.45.

Rather than focus on Judge Ryan's emotional dissent, the Kellys choose to focus on the law. The majority of the panel saw an agency that failed to comply with an Act of Congress and fashioned what it perceived to be an equitable result. Judge Ryan adopted a mindset of indifference to the law in order to achieve an emotional result that only encourages judicial activism rather than adherence to the law. Agency action contrary to law was the edifying exercise before the Sixth Circuit that, although lost on Judge Ryan,

was perceptively examined by the other five judges who reviewed this matter on two separate occasions and accurately assessed HUD's failure to comply with the law.

C. No Conflict with Decisions in Other Courts

Congress and this Court never countenanced that damages would be awarded on time-barred complaints. The principle is that strict adherence to procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law. Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980) and Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984).

D. Decision Below Does Not Conflict with Intent of Congress

The faster and more practical remedies envisioned by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619, codified at 42 U.S.C. Section 3601, et seq. are not present in this case. The reason they are not present is the failure of HUD to act.

The faster and more practical remedies envisioned and mandated by Congress were an investigation and issuance of a probable cause determination within 100 days. 42 U.S.C. 3610 (B)(iv). If the Secretary is unable to complete the investigation within 100 days, the Secretary must notify the parties in writing of the reasons for not completing the investigation. 42 U.S.C. 3610(c). Even HUD's self-serving affidavit (Petitioner's App. H 145-146) demonstrates that HUD failed to comply with the Fair Housing Act. The law requires a reason why the investigation could not be completed and not a generic computer notice that was never sent to the Kellys. The notices required by law, and purportedly sent, were sent to the wrong address as evidenced

by the record, and the HUD representative's own affidavit, which directly conflicts with the stipulation of HUD trial counsel at trial, states that the notice to extend was never served on John T. Kelly [Petitioner's App. H 146(2)]. If one reads the affidavit concerning who was served, the duplicity of HUD is clear.

HUD had no authority to issue a probable cause determination after it failed to comply with the law to preserve its jurisdiction. The purported jurisdiction of the Administrative Law Judge was illusory. When it enacted the Fair Housing Act, Congress mandated clear, specific deadlines and prompt processing of complaints. It is not this Court's place, much less an Administrative Law Judge's, to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction. Mohasco at 825, 826.

E. The Court of Appeals' Decision Conforms with the Law.

The decisions below do not demonstrate animosity between the Sixth Circuit and HUD, but rather the reluctance of a Court to condone agency inaction that violates the law and its refusal to serve as a rubber stamp. The agency Administrative Law Judge provided the rubber stamp on three occasions. A review of the record and, in particular, Jung's testimony, spotlights the lawlessness and incompetency of HUD. The fact that Jung has saddled the Sixth Circuit with two separate cases concerning his conduct during the investigation of housing complaints is noteworthy.[10] Quite

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[10] Jung also was the investigator assigned in Baumgardner v. HUD, 960 F.2d 572 (6th Cir. 1992). In that proceeding, Jung procrastinated concerning conciliation, his investigation and reasonable

possibly the majority, unlike the Administrative Law Judge, believes that Congress envisioned that the rights of all parties should receive protection. The "unedifying exercise in unrestrained judicial power" in this case was at the Administrative Law Judge level when he failed to enforce the law as written against an agency that employs him. The majority fashioned a remedy for the Petitioner when there should be none, and the dissent engaged in semantics to shield HUD regardless of its conduct.

F. **No High Importance.**

If HUD follows the law, there is no damage issue or two-tiered system. What is unjust in the extreme is to subject citizens to the whim and caprice of a government agency whose conduct violates the law. What is unjust in the extreme is the carte blanche attitude extended to HUD and every other governmental agency by a dissenting opinion that winks at gross misconduct by the government. What protects the parties to these types of proceedings is the panel majority that makes all parties follow the law without special dispensation.

The quest for simple justice in this case has cost the Kellys in excess of $100,000.00 as a result of HUD's violations. Far from an unedifying exercise for the Kellys, they have viewed, first-hand, unrestrained government power. The frustration is not with Staples but with an agency that has a mindset of vendetta justice. HUD has a demonstrated history of failing to comply with the law, and to grant certiorari will only reinforce its lawless conduct.

This case underscores that a federal agency must comply with the law as written. An agency cannot rely on its

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cause determination.

agency's Administrative Law Judge to provide cover so it can do as it pleases regardless of the law. When agency action is viewed by an impartial and disinterested judicial panel, the agency's violation of the law is rightfully called into question. The Sixth Circuit expects HUD to comply with the law and turn square corners. The Administrative Law Judge, on the other hand, provides cover for a dawdling group of buffoons at HUD by attempting to shield an incompetent HUD investigator, his superiors and the procedures utilized by HUD from the Sixth Circuit's wrath. The Administrative Law Judge gutted the jurisdictional and due process requirements of the Fair Housing Act guaranteed to the Kellys for the sake of nailing them. It appears that the mindset at HUD is that it should not be challenged. HUD perceives itself as above the law and, quite frankly, who will take on a rogue government agency when the cost is so extreme? Rights of citizens are vanquished because the cost of battling such an amoral and illegal operation is usually prohibitive.

HUD obviously does not perceive this case as a matter of great importance, or it would be petitioning the Court for a writ of certiorari. However, HUD may attempt to come in at the last minute with fraudulent affidavits, notices sent to the wrong court, and notices sent to different respondents in the hope of obtaining a dispensation from this Court's rules. It worked at the Administrative Law Judge's level, and HUD has demonstrated that if it is given an inch, it will take a mile.

CONCLUSION

Petitioner has presented this Court with no cognizable reason to review the Sixth Circuit's decision. Nothing in the Sixth Circuit's decision is in conflict with any case cited by Petitioner. For these reasons, the Petitioner's Writ for Certiorari should be denied.

/S/ _____
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Counsel of Record

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Attorney for Respondents

APPENDIX A

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Dionne Staples,

Charging Party,

v.

Michael P. Kelly and John T. Kelly

Respondents.

HUDALJ
05-90-0879-1
Decided:
September 21, 1995

Robert G. Kelly, Esquire
For the Respondents

Frederick M. Morgan, Jr., Esquire
For the intervenor

Kathleen M. Pennington, Esquire
For Charging Party

Before: Thomas C. Heinz
Administrative Law Judge

INITIAL DECISION AND ORDER ON APPLICATIONS FOR ATTORNEY'S FEES

Background

On August 26, 1992, I issued a decision in this case concluding that Respondents violated sections 804(a),(b), and (c) of the Fair Housing Act as amended (42 U.s.C. §§3604(a), (b), and (c))("the Act"). The decision included an award of damages to Complainant-Intervenor Dionne Staples and an injunction. HUD v. Kelly, 2 Fair Hous.-Fair Lend. (P-H)P. 25,034, 25,363 (HUD A.L.J. Aug. 26, 1992). Respondents appealed the decision to the United States Court of Appeals for the Sixth Circuit, which affirmed the liability findings and the injunction but vacated the damages award to Complainant-Intervenor so that HUD could again attempt to conciliate the damages issue. Kelly v. HUD, 3 F.3d 951 (6th Cir. 1993). After HUD's conciliation efforts failed for the second time, I reconsidered the damages award pursuant to the Circuit Court's order, an on December 1, 1994, issued an Initial Decision on Remand that reduced the original award of damages by $1 to $10,429.76 plus interest. Respondents appealed that decision in a petition that is currently pending before the Circuit Court.

Complainant-Intervenor has filed an application for an interim award of her attorney's fees and expenses in the amount of $35,362.46 to cover litigation costs from May 6, 1992, through January 12, 1995. Respondents oppose the

application and request an award of attorney's fees and costs in their own behalf in the amount of $46,432.69 for their legal expenses from March 11, 1992, through January 23, 1995.

Discussion

Section 812(p) of the Act provides that a prevailing party (other than HUD) in an administrative proceeding under the Act may recover attorney's fees and costs. (42 U.S.C. §3612(p)) Section 104.940(b) of the regulations also provide that

> To the extent that a intervenor is a prevailing party, the respondent will be liable for reasonable attorney's fees unless special circumstances make the recovery of such fees and costs unjust.

A prevailing party is any party that succeeds on any significant issue in litigation that achieves some of the benefit the party sought in bringing suit. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). See also Busche v. Burkee, 649 F.2d 509, 521 (7th Cir.), cert. denied, 454 U.S. 897 (1981); Dixon v. City of Chicago, 948 F. 2d 355, 357-58 (7th Cir. 1991). A plaintiff has prevailed when she has "established the legal liability of the opposing party...." Hanrahan v. Hampton, 446 U.S. 754, 757 (1980). Inasmuch as Respondents were found to have violated the Act as charged by Complainant-Intervenor and were ordered to pay damages to Complainant-Intervenor, Complainant-Intervenor is a prevailing party. Respondents, on the other hand, are not prevailing parties because they have not succeeded in obtaining the only thing they have sought in this litigation-dismissal of the case. Furthermore, to receive attorney's fees under the Equal

Access to Justice Act, Respondents would also have to demonstrate that the position of the Charging Party was not "substantially justified," an impossible task inasmuch as the Charging Party prevailed in the case.[1]

[1] Subsection 2412(d) of the Equal Access to Justice Act (28 U.S.C. §2412 provides in pertinent part:

> (A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses in addition to any costs awarded pursuant to subsection (a) incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review or agency action, brought by or against the United in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

An Interim Award Is Appropriate

Although the Circuit Court has yet to rule finally on some of the issues presented by this case, an interim award of attorney's fees is nevertheless appropriate. In Hanrahan v. Hampton, the Supreme Court held that a plaintiff is entitled to an interim attorney's fee award upon demonstrating "entitlement to some relief on the merits of [her] claims," 446 U.S. at 758. See also Texas State Teachers Ass'n. v. Garland Independent School District, 489 U.S. 782, 791-92 (1989); Brunet v. City of Columbus, 642 F. Supp. 1214, 1254 (S.D. Ohio 1986)(interim fees awarded in Title VII case based upon favorable liability ruling and interlocutory injunctions); Kind v. Palmer 641 F. Supp. 186, 189-90 (D.D.C. 1986)(interim fee award based upon favorable liability ruling in Title VII case). The Sixth Circuit Court has affirmed Respondents' legal liability as well as Ms. Staples' entitlement to damages. She is therefore entitled to her attorney's fees, if reasonable.

An interim fee award may be made immediately payable to alleviate economic hardship to plaintiff's counsel. See, e.g., Carpenter v. Stephen F. Austin State University, 706 F.2d 608, 633 (5th Cir. 1983)(affirming award of interim fees "in order to prevent extreme cash-flow problems of the plaintiffs and attorneys"); Ramos v. Lamm, 632 F. Supp. 376, 389 n. 10 (D. Colo. 1986)(awarding interim fees in case that lasted several years); Palmer v. City of Chicago, 596 F. Supp. 1060, 1062 (N.D. Ill. 1984)(awarding interim fees where counsel "have spent hundreds of hours on the case without pay"), rev'd on other grounds, 806 F.2d 1316 (7th Cir. 1986), cert. denied, 481 U.S. 1049 (1987); Smiddy v. Varney, 574 F. Supp. 710, 714 (C.D. Cal. 1983)(immediate payment of interim fees ordered to avoid "substantial hardship" to attorneys who had worked on case for six years).

In the instant case, Mr. Morgan, counsel for Complainant-Intervenor, has devoted more than 200 hours to this case since May 1992 without receiving payment of any fees or expenses. He has been sole practitioner since March 1993, and a large part of his practice consists of contingent-fee, civil rights litigation. This case represents a substantial fraction of his uncompensated work. Application, Exhibit 1. These circumstances support issuance of an interim award of attorney's fees.

Summary of Respondents' Complaints

The Supreme Court in Hensley stated that the "most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." 461 U.S. at 433. Respondents have not contested the claim by Complainant-Intervenor's counsel that his current billing rate of $150 per hour is reasonable. Rather, they complain that special circumstances require denial of the application for fees and costs file by Complainant-Intervenor; that with regard to the first phase of litigation, counsel "wants 20% interest on a fee application that he submitted on behalf of a law firm with which he is no longer associated"; that counsel engaged in noncompensable activities on behalf of his client; and finally, that even when engaged in compensable activities he often took too much time to accomplish the tasks. Respondents' brief, p. 8.

"Special Circumstances" Do Not Exist

"[T]he Supreme Court has held that although it is within the district court's discretion to award attorney's fees under [civil-rights fee-shifting statutes], `in the absence of special circumstances a district court not merely `may' but

must award fees to the prevailing plaintiff...." ' Morscott v. City of Cleveland, 936 F.2d 271, 272 (6th cir. 1991), quoting Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754, 761 (1989) (emphasis in original). The Supreme Court has also held that a "court's discretion to deny a fee award to a prevailing plaintiff is narrow." New York Gaslight Club v. Carey, 447 U.S. 54, 68 (1980). Moreover, a defendant who claims "special circumstances" has the burden to demonstrate them, "and the defendant's showing must be a strong one." Herrington v. County of Sonoma, 883 F.2d 739, 744 (9th Cir. 1989), citing J&J Anderson, Inc. v. Town of Erie, 767 F.2d 1469, 1474 (10th Cir. 1985). Respondents have failed to meet that burden.

The only "special" circumstances Respondents cite are the conclusions by the Sixth Circuit Court of Appeals that the Secretary impermissibly delayed processing Ms. Staples' complaint and did not provide Respondents with objectively reasonable conciliation before issuing the Charge of Discrimination. The Secretary was responsible for those procedural errors, not Ms. Staples or her counsel. Respondents cite no authority and none has been found for the proposition that respondents found guilty of housing discrimination should be relieved of their duty to pay attorney's fees to a prevailing complainant-intervenor because the Secretary committed procedural error while processing the case. In short, there is no support in fact or law for Respondents' argument that "special circumstances" require denial of Complainant-Intervenor's application for an award of attorney's fees and costs.

Furthermore, no statute, regulation, or case supports Respondents' suggestion that the Secretary rather than Respondents should pay Ms. Staples' attorney's fees. The only case cited by Respondents to support their suggestion,

Huderson v. U.S. Dept. of Housing and Urban Development, 737 F. Supp. 20 (E.D.Pa. 1989), is inapposite. Unlike the instant case, the Department did not prevail in Huderson and was required under the Equal Access to Justice Act to pay attorney's fees to the plaintiff who did.

Details of Respondents' Complaints

During the first phase of the instant litigation, counsel for Complainant-Intervenor charged $120 per hour in civil rights cases. He now requests an attorney's fee award at the rate of $150 per hour for all of his time spent on the case up to January 1995. Respondents object. In Missouri v. Jenkins, 491 U.S. 274 (1989), the Supreme Court held that a fee award should fully compensate a prevailing plaintiff's counsel through "an appropriate adjustment for delay in payment--whether by the application of current rather than historic hourly rates or otherwise[.]" Id. at 284. The Court in Jenkins affirmed an award reflecting counsel's current $275-per -hour rate for all of the time expended on the case over 15 years. The principle announced in Jenkins has been reaffirmed in recent cases in the Southern District of Ohio. In White v. Morris, 863 F. Supp. 604, 611 (S.D. Ohio 1994), the Court held that "district courts should award reasonable attorney's fees according to the current market rates in the relevant community." See also James v. Runyon, 868 F. Supp. 911 (S.D. Ohio 1994). Because the case law supports an award based on current rather than historical rates, there is not merit to Respondents' complaint regarding the hourly rate of compensation for the first phase of this litigation.

Respondents also complain that counsel seeks compensation for time spent on activities that do not appear to have directly benefited his client, such as time spent

addressing the issue of witness fees for witness who did not appear at trial, and time spent preparing a notice of appeal that was later withdrawn. These complaints have no merit. During the ordinary course of litigation, attorneys almost always find that they have chosen a line of inquiry or a course of action that must be abandoned. As long as the choice was reasonable at the outset and success is finally achieved, the attorney cannot be faulted simply because a particular activity later proves a "dead end." The mere fact that time was spent in this case on an appeal that was later withdrawn or in dealing with potential witnesses who did not appear at trial does not prove that it was unreasonable for counsel to have pursued those activities at the outset.

Respondents also complain that counsel spent time consulting with Ms. Staples' previous counsel, the Government's investigator, the Secretary's counsel, and non-parties. These complaints are also meritless.

Substitution counsel necessarily will have to spend time with previous counsel, or the client, or both, to become familiar with the history of the litigation. Respondents have not demonstrated that the amount of time Mr. Morgan spent consulting with Ms. Staples' previous counsel was unreasonable under the circumstances.

Respondents fall wide of the mark with their complaint that Mr. Morgan and the Secretary's counsel jointly prepared their witnesses for trial. In many respects the interests of the two parties were identical, and it was necessary and proper for counsel to prepare witnesses jointly in order to preclude unnecessary duplication at trial. Counsel for Complainant-Intervenor did not unnecessarily duplicate the work of counsel for the Secretary in this case.

It was appropriate for Complainant-Intervenor's counsel to consult with the Government's investigator who testified in this case, just as it is appropriate for counsel to consult with any witness in any case. This is particularly true when, as here, the conduct of the witness had become the subject of appellate litigation.

The non-parties about whom Respondents complain apparently were either amici or potential amici in the appellate litigation. Such consultations are common to appellate litigation, and nothing in the record shows that Mr. Morgan amici consultations were untoward in any respect.

On May 18, 1994, after analyzing the original decision and damages award, counsel for Complainant-Intervenor sent a letter to the Secretary's counsel containing a settlement demand. Mr. Morgan requests compensation for 3.10 hours expended on these activities. According to Respondents, it should not have taken 3.10 hours to accomplish these tasks. Although some attorneys may have been able to complete these tasks in less time, nothing in the record shows that Mr. Morgan's request is outside the range of the reasonable. The same can be said for Respondents' complaint that it should not have taken 13.70 hours to respond to this court's August 1994 briefing order.

Respondents argue that Mr. Morgan is guilty of padding his bill. To support their argument they cite several minor charges, such as a .50 hour charge concerning a conference call on July 13, 1992, an alleged duplication of charges on September 25 and 26, 1993, and telephone calls in February 1994 to people at HUD and the Department of Justice regarding conciliation and a mediation plan.

Respondents mischaracterize the July 13, 1992, charge

as "a charge of .50 hours for a set up of call to the Court." (Brief, p. 7) Mr. Morgan's invoice of october 23, 1992 shows that the .50 hour charge includes the time spent to the conference call itself. it is not a charge for doing nothing.

Mr. Morgan's invoice shows that a September 25, 1993, he spent .30 hours to "R&R BKelly's petition for rehearing." These two entries simply show that counsel spent a total of 1.4 hours to accomplish a single task, not that he charged his client twice for the same work.

Similarly meritless are Respondents' protests that counsel cannot charge for telephone calls regarding conciliation and mediation in february 1994 because HUD had made no conciliation efforts and Respondents were not notified of any mediation plan in February 1994. Mr. Morgan explains that the purpose of his telephone calls was to determine when mediation efforts would begin and to try to move the case along. Reply brief. p. 12.

Respondents also protest Mr. Morgan's request to be compensated for time spent preparing a request for rehearing filed in the circuit Court of Appeals, preparing fee applications, and helping Ms. Staples secure a loan. Unlike their other complaints, these protests are well-founded.

Between August 28, 1993, and October 2, 1993, Mr. Morgan spent 27.8 hours on this case, of which 14.6 hours were devoted to preparing and filing a petition for rehearing and suggestion for rehearing en banc. The petition appears to have been rejected by the Circuit Court because it was untimely filed. In the absence of an explanation and justification for this apparent violation of court rules, compensation for time spent preparing and filing the petition must be denied. The remainder of the time claimed for this

period is compensable because it was spent consulting with amici and counsel for the parties, responding to Respondents' litigation initiatives, and researching issues that arose later in the litigation.

Counsel's request to be compensated for 22.4 hours sent preparing fee applications (nearly 10 percent of the total claim) is excessive on its face. Much of that time was unnecessarily spent preparing legal arguments with which Respondents have had no quarrel. An application for fees need include no more than a summary of the black-letter law, along with an affidavit an itemized invoices. One full day (eight hours) should have sufficed to complete the appropriate level of research and prepare the applications and supporting documents, particularly for an attorney who is claiming expertise in housing discrimination litigation. The fee award will be reduced accordingly.

Securing a loan for a client is not within the normal duties of counsel in a housing discrimination case and is therefore not compensable.

Respondents argue that it was unreasonable for Complainant-Intervenor's counsel to spend 234 hours on this case. That argument is unpersuasive in light of the claim by Respondents' counsel that he had spent 377.25 hours on the case as of January 1995. After reducing Mr. Morgan's fee application for the reasons discussed above, Complainant-Intervenor will e compensated for fees covering 202.6 hours. In hourly terms, that amount constitutes approximately 54 percent of Respondents' claim. Assuming that the amount of time Respondents' counsel spent on the case was reasonable and justifiable, it necessarily follows that it was not unreasonable for Complainant-Intervenor's counsel, one of two attorneys opposing Respondents' counsel, to spend

approximately half that amount of time on the case.[2]

Conclusions

Complainant-Intervenor has prevailed in this case an is therefore entitled to an award of attorney's fees. Respondents have not prevailed an therefore are not entitled to an award of attorney's fees. Excepting the elements addressed above, Complainant-Intervenor's application for an interim award of attorney's fees and costs appears reasonable.[3] Although some issues raised in this case are currently before the Circuit Court of Appeals, an interim award of attorney's fees is appropriate under the circumstances.

ORDER

It is hereby ORDERED that:

1. Complainant-Intervenor's application for an award of interim attorney's fees and costs is granted;

2. Within 30 days of the date of this Order, Respondents shall pay Complainant-Intervenor a total of $30,652.46, consisting of attorney's fees covering 202.6 hours at $150 per hour, plus $262.46 for costs; and

3. Respondents' application for attorney's fees is denied.

THOMAS C. HEINZ
Administrative Law Judge

Dated: September 21, 1995.

[2]Besides filing briefs, counsel for Complainant-Intervenor conducted the principal direct examination of Ms. Staples (TR. 290-327) and the principal cross-examinations of Respondents (TR 487-565; 589-91; 635-52) and other witnesses. His work materially aided the court in resolving the issues presented by the case.

[3]Those arguments of the respondents not expressly addressed herein are argumentative, frivolous, or niggling, and are therefore meritless. In Kurowski v. Krajewski. 848 F.2d 767 (7th Cir. 1988), cert. denied, 488 U.S. 926 (1989), the court condemned complaints about charges for very short period of attorney time as "[n]iggling objections" that "simply increase the ultimate bill and waste judicial time." Id. at 777.

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DECISION FOR ATTORNEY FEES APPLICATION AND ORDER issued by THOMAS C. HEINZ, Administrative Law Judge, in HUDALJ 05-90-0879-1, were sent to the following parties on this 21st day of September, 1995, in the manner indicated:

_____
Chief Docket Clerk

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APPENDIX B

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States
Department of Housing and Urban
Development, on behalf of
Dionne Staples,

Charging Party,

v.

HUDALJ 05-90-08789-1

Michael P. Kelly
John T. Kelly
James Kelly d/b/a
Michael P. Kelly, Realty

Respondents.

ORDER

Having considered Respondents' request for the issuance of subpoenas, and the positions of the parties during a telephone conference on May 18, 1992, I conclude that the

request should be granted in part.

To the extent that Respondents seek to subpoena each other, and to subpoena Thomas Higginbotham, and attorneys Konrad Rayford, Geoffrey Roupas, and Lewis Nixon, none of whom is a fact or expert witness with testimony expected to be relevant to the issues in this proceeding, the request for subpoenas is denied.

ALAN W. HEIFETZ
Chief Administrative Law Judge

Dated: May 19, 1992

CERTIFICATE OF SERVICE

I hereby certify that copies of this ORDER issued by ALAN W. HEIFETZ, Chief Administrative Law Judge, in HUDALJ 05-90-0879-1, were sent to the following parties on this 19th day of May, 1992, in the manner indicated:

_____

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APPENDIX C

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States
Department of Housing and Urban
Development, on behalf of
Dionne Staples,

Charging Party,

v.

HUDALJ 05-90-0879-1

Michael P. Kelly, et. al.,

Respondents.

ORDER

On May 1, 1992, Respondents filed the following four motions:

1. Motion of Respondent Michael P. Kelly to Dismiss Determination of Reasonable Cause and Charge of Discrimination and Request for a Protective Order;

2. Motion of Respondent John T. Kelly to Dismiss Determination of Reasonable Cause and Charge of Discrimination and Request for a Protective Order;

3. Motion of Respondent Michael P. Kelly Realty for Protective Order; and

4. Motion of Respondent James Kelly to Dismiss Determination of Reasonable Cause and Charge of Discrimination and request for a Protective Order.

On May 13, 1992 the Government filed a prehearing statement stipulating that James Kelly is not a party to this case. Accordingly, an order will be issued removing James Kelly from the case, thereby rendering motion number 4. moot.

The Government opposes the motions. All will be denied. The first two are largely duplicative. They allege a variety of irregularities on the part of the Government (sometimes "the Secretary") during the period beginning with the filing of a housing discrimination complaint (hereinafter "the complaint") by Dionne Staples and ending with the service by the Secretary of the Determination of Reasonable Cause and Charge of Discrimination (hereinafter sometimes "the Charge") which initiated this proceeding. More specifically, Respondents pose five arguments to support their motion to dismiss:

Argument 1. The Secretary failed to serve notice of Dionne Staples' complaint on each of the Respondents by certified mail or personal service within ten days of filing, as required by 24 C.F.R. Sec. 103.50. This argument is without merit. The Government contends that copies of the complaint filed by Dionne Staples on May 17, 1990, were

sent on May 18, 1990, to Respondents Michael and John Kelly by certified mail. Copies of return receipt cards bearing the signatures of Michael P. Kelly and John Kelly have been submitted to show that Michael and John Kelly received copies of the complaints on May 24 and May 25, 1990, respectively. Michael P. Kelly was served at his place of business rather than his personal residence, but service may be effected at a respondent's place of business as well as his usual place of abode. See 24 C.F.R. Sec. 103.9. Respondents Michael and John Kelly accordingly received timely and proper service of the complaint filed by Dionne Staples on May 17, 1990, as required by 24 C.F.R. Sec. 103.50.

Argument 2. The Secretary failed to complete the investigation of the complaint within 100 days, and failed to notify Respondents of the reasons why the investigation could not be completed within 100 days, as required by 24 C.F.R. Sec. 103.225. The Secretary concedes that the allegations contained in this argument are true.

3. In an argument closely related to argument number 2., Respondents contend that the Secretary failed to make a reasonable cause determination within 100 days of the filing of the complaint as required by 24 C.F.R. Sec. 103.400, and failed to notify Respondents of the reason for the delay, as required by 24 C.F.R. Sec. 103.400(c)(2). However, Respondents have not demonstrated that the errors specified in arguments 2. and 3. require dismissal of the Charge. The United States Court of Appeals for the Sixth Circuit in *Baumgardner v. HUD*, No. 91-3039 (March 3, 1992) recently established a "substantial prejudice" test to be applied when the record shows "procedural shortcomings" on the part of the Government. Slip op. 9. The Sixth Circuit Court found errors in that case like those found in the instant

case. For example, in *Baumgardner* the Government failed to complete its investigation within 100 days and failed to give the petitioner notice of the reasons for delay. Although the Government committed several additional procedural errors in *Baumgardner* not found in the instant case, the *Baumgardner* Court held that the Government's errors were not sufficiently prejudicial to require dismissal of the Charge. In the instant case, the record does not demonstrate how Respondents have suffered any substantial prejudice as a result of the Government's failure to complete its investigation and issue the reasonable cause determination within 100 days and notify Respondents of the reasons for that failure. Hence, dismissal of the Charge cannot be justified.

When the same issue arose in *United States v. Scott, et. al.*, No. 90-1374-7 (D. Kans. March 25, 1992), the Court held that the secretary's failure to complete an investigation of a housing discrimination complaint and make a reasonable cause determination within the 100 days required by statute did not warrant a dismissal of the action. The Court noted that the 100-day requirement is not a *per se* limitation. Section 3610 of 42 U.S.C. and he parallel regulation section, 24 C.F.R. Sec. 103.400(c)(1), require the Secretary to conclude the investigation and make a reasonable cause determination within 100 days of the filing of the complaint, "unless it is impracticable to do so." Furthermore, the statute and the regulations do not specify the consequences of failing to meet the deadline. The *Scott* Court concluded that:

> because section 3610 of the Fair Housing Act contains the "impracticability" qualification and fails to specify the consequences of HUD's

> noncompliance, this court concludes that Congress did not intend the 100-day statutory deadline to operate as a jurisdictional prerequisite or a statute of limitations to justify dismissing this action.

I find the reasoning of the *Scott* Court persuasive. Dismissal is not warranted for the Government's procedural shortcomings in this case.

Argument 4. The Secretary failed to give Respondents notice of Dionne Staples' complaint and an opportunity to respond before issuing the Charge as required by 24 C.F.R. Sec. 103.405. This argument is meritless. The record demonstrates that Respondents Michael P. Kelly and John T. Kelly were given notice of Dionne Staples' complaint and an opportunity to respond before the Secretary issued the Charge. They, in fact, did respond to the complaint by sending answers in letter form to HUD on May 29, 1990, and August 7, 1990, respectively.

Argument 5. The Secretary failed to serve the reasonable cause determination in compliance with 24 C.F.R. Secs. 103.405 and 104.40. This argument is also without merit. The Determination of Reasonable Cause and Charge of Discrimination was sent to the Respondents by certified mail by the Secretary on March 2, 1992, and again on March 11, 1992, after amendment. Respondent Michael P. Kelly acknowledged receipt on March 13, 1992 and on March 23, 1992, as evidenced by return receipt cards in the record which bear his signature. The Determination of Reasonable Cause and Charge of Discrimination was mailed to John T. Kelly at the address appearing under his signature on his

August 7, 1990, response to the complaint, that is, 3027 Erie Ave., Cincinnati, Ohio. Someone named either "A." or "H." Kelly acknowledged receipt at that address on March 30, 1992. Respondent has not demonstrated that the person who acknowledged receipt was not of suitable age or discretion to receive this material on behalf of Respondent John T. Kelly. Section 104.40 of the regulations (24 C.F.R. Sec. 104.40) provides: "Service of documents upon any party may be made by personal service or by mailing a copy to the last known address." The record shows the Government has satisfied this requirement. In sum, Respondents' motions to dismiss have no merit.

In additional to seeking dismissal of this action, Respondents have moved for a protective order prohibiting the Secretary from pursuing certain of his discovery requests. During a telephone conference on May 15, 1992, between counsel for the parties and the undersigned, counsel revealed that most of the Government's discovery requests were honored subsequent to the filing of Respondents' requests for a protective order. Moreover, the Government has not indicated any desire to pursue discovery beyond that already acquired. Accordingly, Respondents' requests for a protective order have been mooted.

During the May 15, 1992, conference, the parties agreed that "Michael P. Kelly Realty" is not a separate legal entity.

It is hereby ORDERED:

1. James Kelly is not a party to this case and his name shall be removed from the case style; and

2. All of the motions filed by Respondents on May 1, 1992 are denied.

THOMAS C. HEINZ
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this ORDER issued by THOMAS C. HEINZ, Administrative Law Judge, in HUDALJ 05-90-0879-1, were sent to the following parties on this 21st day of May, 1992, in the manner indicated:

_____

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APPENDIX D

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States
Department of Housing and Urban
Development, on behalf of
Dionne Staples,

CORRECTED COPY

Charging Party,

HUDALJ 05-90-0879-1

v.

Michael P. Kelly and
John T. Kelly

Respondents.

ORDER

On August 26, 1992, I issued a decision concluding that Respondents violated §§804(a), (b), and (c) of the Fair Housing Act as amended (42 U.S.C. §§3604 (a), (b), and (c)). The decision awarded damages of $10,430.76 to

Complainant Dionne Staples but declined to impose any civil penalties. Respondents appealed the decision to the Sixth Circuit Court of Appeals, which issued its decision on August 27, 1993, in *Kelly, et al. v. Secretary, HUD*, 3 F.3d 951 (6th Cir. 1993). The Court of Appeals affirmed the liability findings of the decision below, vacated the damage award, and remanded the case to the Secretary:

> for the purpose of conducting conciliation with a qualified conciliator other than Charles Jung, who has had no previous contact with this case. If conciliation fails, the case will be returned to the ADMINISTRATIVE LAW JUDGE for reconsideration and such further proceedings as may be required in light of this opinion; but in no case should damages be assessed for the period during which HUD completely neglected this case.

3F.3d 957-58.

I have been informed by letter dated July 18, 1994, from the Secretary's Assistance General Counsel of the Midwest that the additional conciliation efforts required by the court have failed, leaving the parties at an impasse. The damage issue must therefore be reconsidered. To assist me in that task, the parties are hereby **ORDERED** to file on or before **September 20, 1994,** briefs addressing the following:

1. Excepting the opinion in *Kelly*, what authority, if any, exists for or against the proposition that the victim of a civil rights violation must suffer a reduction in proven compensatory damages if the Government committed procedural errors during the period preceding the issuance of the Government's complaint?

2. Identify, with citations to the record, the beginning and ending dates of the period(s) during which HUD "completely neglected" the case initiated by Complainant Staples;

3. Section 3610 of the Act requires that the Government complete the investigation of a complaint, attempt to conciliate the complaint, make a reasonable cause determination of the merits of the complaint, and, where warranted, issue the charge of discrimination within 100 days of the filing of the complaint, "unless it is impracticable to do so." Section 3612(g) of the Act requires the ADMINISTRATIVE LAW JUDGE to commence the hearing "no later than 120 days following the issuance of the charge, unless it is impracticable to do so." In the instant case, can the Sixth Circuit's *Kelly* decision be read to approve the accrual of damages during the period beginning with the discriminatory event and ending 220 days after the filing of the complaint, regardless of whether or not the Government "completely neglected" the case at any time during those 220 days? In other words, is the 220-day period immune from attack? If the accrual period for compensatory damages may properly extend beyond the 220-day limit, what determines the length of the extension? Did the court mean to say that it will approve a damage accrual period longer than 220 days only to the extent that the record shows that for each and every business day beyond the 220th day the Government was acting to advance the case? Do damages accrue for those days when the Government acted but not for those days when it did not? May days of Government inactivity be added to the accrual period? If so, how many and on what jurisdiction? What determines the closing date for an accrual period extending beyond the 220th day?

4. In *Baumgardner v. HUD ex rel Holley*, 960 F.2d

572 (6th Cir. 1992), approximately 17 months transpired from the filing of the complaint until the trial. Although the Sixth Circuit criticized HUD's "procrastinations" in that case, the court did not reduce the compensatory damage award based on HUD's delays in presenting the case for adjudication. (Instead, the court reduced the compensatory damage award based on evidentiary considerations.) Would 17 months be a reasonable accrual period for compensatory damages in the instant case inasmuch as the Sixth Circuit seems to have approved in *Baumgardner*?

5. In the *Baumgardner* case, the Sixth Circuit Court used the term "damages" to include civil penalties. See *Hud v. Kelly*, 2 Fair Hous.-Fair Lend. (P-H) Para. 25, 034, 25, 363 n.26 (HUD A.L.J. Aug. 26, 1992). Did the court mean to include civil penalties within the meaning of the word "damages" as quoted in the first paragraph of this Order? If so, does the *Kelly* opinion permit compensatory damages to be increased by HUD's delays if the increase if offset by a correspondingly reduced civil penalty?

6. The parties may address any other issues in their briefs that they consider relevant in light of the Sixth Circuit's opinion in *Kelly*.

/s/_____
THOMAS C. HEINZ
Administrative Law Judge

Dated: August 16, 1994

CERTIFICATE OF SERVICE

I hereby certify that copies of this ORDER issued by THOMAS C. HEINZ, Administrative Law Judge, in HUDALJ 05-90-0879-1, were sent to the following parties on this 16th day of August, 1994, in the manner indicated:

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APPENDIX E

Sec. 802, 42 U.S.C. §3602. Definitions

As used in this subchapter--

(k) "Familial status" means one or more individuals' (who have not attained the age of 18 years) being domiciled with--

> (1) a parent or another person having legal custody of such individual or individuals; or
>
> (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

> (1) "Conciliation" means the attempted resolution of issues raised by a complaint, or by the investigation of such complaint, through informal negotiations involving the aggrieved person, the respondent, and the Secretary.
>
> (n) "Respondent" means--
>
> (1) the person or other entity accused in a complaint of an unfair housing practice; and
>
> (2) any other person or entity identified in the course of investigation and

notified as required with respect to respondents so identified under section 3610(a) of this title.

Section 807, 42 U.S.C. §3607. Religious organization or private club exemption

(b)(1) Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons.

Section 808, 42 U.S.C. §3608. Administration

(a) Authority and responsibility

The authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development.

(c) Delegation of authority; appointment of administrative law judges; location of conciliation meetings; administrative review

The Secretary may delegate any of his functions, duties, and powers to employees of the Department of Housing and Urban Development or to boards of such employees, including functions, duties, and powers with respect to investigating, conciliating, hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter under this subchapter. The person to whom such delegations are made with respect to hearing functions, duties, and powers shall be appointed and shall serve in the Department

of Housing and Urban Development in compliance with sections 3105, 3344, 5372, and 7521 of title 5. Insofar as possible, conciliation meetings shall be held in the cities or other localities where the discriminatory housing practices allegedly occurred. The Secretary shall by rule prescribe such rights of appeal from the decisions of his administrative law judges to other administrative law judges or to other officers in the Department, to boards of officers or to himself, as shall be appropriate and in accordance with law.

(d) Cooperation of Secretary and executive departments and agencies in administration of housing and urban development programs and activities to further fair housing purposes

All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

(e) Functions of Secretary

The Secretary of Housing and Urban Development shall--

(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter; and

Section 810, 42 U.S.C. § 3610. Administrative enforcement; preliminary matters

(a) Complaints and answers

(1)(A)(i) An aggrieved person may, not later than one year after an alleged discriminatory housing practice has occurred or terminated, file a complaint with the Secretary alleging such discriminatory housing practice. The Secretary, on the Secretary's own initiative, may also file such a complaint.

(b) Upon the filing of such a complaint--

(i) the Secretary shall serve notice upon the aggrieved person acknowledging such filing and advising the aggrieved person of the time limits and choice of forums provided under this subchapter;

(ii) the Secretary shall, not later than 10 days after such filing or the identification of an additional respondent under paragraph (2), serve on the respondent a notice identifying the alleged discriminatory housing practice and advising such respondent of the procedural rights and obligations of respondents under this subchapter, together with a copy of the original complaint;

(iii) each respondent may file, not later than 10 days after receipt of notice from the Secretary, an answer to such complaint; and

(iv) the Secretary shall make an investigation of the alleged discriminatory housing practice and complete such investigation within100 days after the filing of the complaint (or, when the Secretary takes

further action under subsection (f)(2) of this section with respect to a complaint, within 100 days after the commencement of such further action), unless it is impracticable to do so.

(c) If the Secretary is unable to complete the investigation within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) of this section with respect to a complaint, within 100 days after the commencement of such further action), the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so.

(d) Complaints and answers shall be under oath or affirmation, and may be reasonably and fairly amended at any time.

(2)(A) A person who is not named as a respondent in a complaint, but who is identified as a respondent in the course of investigation, may be joined as an additional or substitute respondent upon written notice, under paragraph (1), to such person, from the Secretary.

(B) Such notice, in addition to meeting the requirements of paragraph (1), shall explain the basis for the Secretary's belief that the person to whom the notice is addressed is properly joined as a respondent.

(b) Investigative report and conciliation

(1) During the period beginning with the filing of such complaint and ending with the filing of a charge or a dismissal by the Secretary, the Secretary shall, to the extent feasible, engage in conciliation with respect to such complaint.

(5)(A) At the end of each investigation under this section, the Secretary shall prepare a final investigative report containing--

(i) the names and dates of contacts with witnesses;

(ii) a summary and the dates of correspondence and other contacts with the aggrieved person and the respondent;

(iii) a summary description of other pertinent records;

(iv) a summary of witness statements; and

(v) answers to interrogatories.

(B) A final report under this paragraph may be amended if additional evidence is later discovered.

(d) Prohibitions and requirements with respect to disclosure of information

(1) Nothing said or done in the course of conciliation under this subchapter may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned.

(2) Notwithstanding paragraph (1), the Secretary shall make available to the aggrieved person and the respondent, at any time, upon request following completion of the Secretary's investigation, information derived from an investigation and any final investigative report relating to that investigation.

(f) Referral for State or local proceedings

(1) Whenever a complaint alleges a discriminatory housing practice--

(A) within the jurisdiction of a State or local public agency; and

(B) as to which such agency has been certified by the Secretary under this

subsection;
the Secretary shall refer such complaint to that certified agency before taking any action with respect to such complaint.

(2) Except with the consent of such certified agency, the Secretary, after that referral is made, shall take no further action with respect to such complaint unless--

(A) the certified agency has failed to commence proceedings with respect to the complaint before the end of the 30th day after the date of such referral;

(B) the certified agency, having so commenced such proceedings, fails to carry forward such proceedings with reasonable promptness; or

(C) the Secretary determines that the certified agency no longer qualifies for certification under this subsection with respect to the relevant jurisdiction.

(g) Reasonable cause determination and effect

(1) The Secretary shall, within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) of this section with respect to a complaint, within 100 days after the commencement of such further action), determine based on the facts whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, unless it is impracticable to do so, or unless the Secretary has approved a conciliation agreement with respect to the complaint. If the Secretary is unable to make the determination within 100 days after the filing of the complaint (or, when the Secretary

takes further action under subsection (f)(2) of this section with respect to a complaint, within 100 days after the commencement of such further action),the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so. (2)(A) If the Secretary determines that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Secretary shall, except as provided in subparagraph (C), immediately issue a charge on behalf of the aggrieved person, for further proceedings under section 3612 of this title.
(B) Such charge--

(i) shall consist of a short and plain statement of the facts upon which the Secretary has found reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur;

(ii) shall be based on the final investigative report; and

(iii) need not be limited to the facts or grounds alleged in the complaint filed under section subsection (a) of this section.

(h) Service of copies of charge
After the Secretary issues a charge under this section, the Secretary shall cause a copy thereof, together with information as to how to make an election under section 3612(a) of this title and the effect of such an election, to be served--

(1) on each respondent named in such charge, together with a notice of opportunity for a hearing at a time and place specified in the notice, unless that election is made; and

(2) on each aggrieved person on whose behalf

the complaint was filed.

Section 811, 42 U.S.C. § 3611. Subpoenas; giving of evidence

(a) In general

The Secretary may, in accordance with this subsection, issue subpoenas and order discovery in aid of investigations and hearings under this subchapter. Such subpoenas and discovery may be ordered to the same extent and subject to the same limitations as would apply if the subpoenas or discovery were ordered or served in aid of a civil action in the United States district court for the district in which the investigation is taking place.

(b) Witness fees

Witnesses summoned by a subpoena under this chapter shall be entitled to the same witness and mileage fees as witnesses in proceedings in United States district courts. Fees payable to a witness summoned by a subpoena issued at the request of a party shall be paid by that party or, where a party is unable to pay the fees, by the Secretary.

(c) Criminal penalties

(1) Any person who willfully fails or neglects to attend and testify or to answer any lawful inquiry or to produce records, documents, or other evidence, if it is in such person's power to do so, in obedience to the subpoena or other lawful order under subsection (a) of this section, shall be fined not more than $100,000 or imprisoned not more than one year, or both.

(2) Any person who, with intent thereby to mislead another person in any proceeding under this subchapter--

(A) makes or causes to be made any false entry or

statement of fact in any report, account, record, or other document produced pursuant to subpoena or other lawful order under subsection (a) of this section; (B) willfully neglects or fails to make or to cause to be made full, true, and correct entries in such reports, accounts, records, or other documents; or (C) willfully mutilates, alters, or by any other means falsifies any documentary evidence; shall be fined not more than $100,000 or imprisoned not more than one year, or both.

Section 812, 42 U.S.C. § 3612. Enforcement by Secretary

(a) Election of judicial determination

When a charge is filed under section 3610 of this title, a complainant, a respondent, or an aggrieved person on whose behalf the complaint was filed, may elect to have the claims asserted in that charge decided in a civil action under subsection (o) of this section in lieu of a hearing under subsection (b) of this section. The election must be made not later than 20 days after the receipt by the electing person of service under section 3610(h) of this title or, in the case of the Secretary, not later than 20 days after such service. The person making such election shall give notice of doing so to the Secretary and to all other complainants and respondents to whom the charge relates.

(c) Rights of parties

At a hearing under this section, each party may appear in person, be represented by counsel, present evidence, cross-examine witnesses, and obtain the issuance of subpoenas under section 3611 of this title. Any aggrieved person may intervene as a party in the proceeding. The Federal Rules of Evidence apply to the presentation of evidence in such hearing as they would in a civil action in a United States district court.

(g) Hearings, findings and conclusions, and order

(1) The administrative law judge shall commence the hearing under this section no later than 120 days following the issuance of the charge, unless it is impracticable to do so. If the administrative law judge is unable to commence the hearing within 120 days after the issuance of the charge, the administrative law judge shall notify the Secretary, the aggrieved person on whose behalf the charge was filed, and the respondent, in writing of the reasons for not doing so.

(p) Attorney's fees

In any administrative proceeding brought under this section, or any court proceeding arising therefrom, or any civil action under section 3612 of this title, the administrative law judge or the court, as the case may be, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the extent provided by section 504 of title 5, United States Code, or by section 2412 of title 28, United States Code.

APPENDIX F

Title 24--Housing and Urban Development
Subtitle B--Regulations Relating to Housing and Urban Development

CHAPTER I--OFFICE OF ASSISTANT SECRETARY FOR EQUAL OPPORTUNITY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
SUBCHAPTER A--FAIR HOUSING

PART 103--FAIR HOUSING--COMPLAINT PROCESSING

Subpart A--Purpose and Definitions

Sec. 103.1 Purpose and applicability.

Section 103.1 Purpose and applicability.

(a) This part contains the procedures established by the Department of Housing and Urban Development for the investigation and conciliation of complaints under section 810 of the Fair Housing Act, 42 U.S.C. 3610.

Section 103.9 Definitions.

The terms Fair Housing Act, General Counsel, and HUD are defined in 24 CFR part 5.

As used in this part,

Personal service means handing a copy of the document to the person to be served or leaving a copy of the document with a person of suitable age and discretion at the place of business, residence or usual place of abode of the person to be served.

Receipt of notice means the day that personal service is completed by handing or delivering a copy of the document

to an appropriate person or the date that a document is delivered by certified mail.

Section 103.15 Who may file complaints.

Any aggrieved person or the Assistant Secretary may file a complaint no later than one year after an alleged discriminatory housing practice has occurred or terminated. The complaint may be filed with the assistance of an authorized representative of an aggrieved person, including any organization acting on behalf of an aggrieved person.

Section 103.30 Form and content of complaint.

(c) Each complaint must contain substantially the following information:

(1) The name and address of the aggrieved person.

(2) The name and address of the respondent.

(3) A description and the address of the dwelling which is involved, if
appropriate.

(4) A concise statement of the facts, including pertinent dates, constituting the alleged discriminatory housing practice.

Section 103.45 Service of notice on aggrieved person.

Upon the filing of a complaint, the Assistant Secretary will notify, by certified mail or personal service, each aggrieved person on whose behalf the complaint was filed. The notice will:

(a) Acknowledge the filing of the complaint and state the date that the complaint was accepted for filing.

(b) Include a copy of the complaint.

(c) Advise the aggrieved person of the time limits applicable to complaint processing and of the procedural rights and obligations of the aggrieved person under this part and Part 180.

(d) Advise the aggrieved person of his or her right to commence a civil action under section 813 of the Fair Housing Act in an appropriate United States District Court, not later than two years after the occurrence or termination of the alleged discriminatory housing practice. The notice will state that the computation of this two-year period excludes any time during which a proceeding is pending under this part or Part 180 with respect to a complaint or charge based on the alleged discriminatory housing practice. The notice will also state that the time period includes the time during which an action arising from a breach of a conciliation agreement under section 814(b)(2) of the Fair Housing Act is pending.

(e) Advise the aggrieved person that retaliation against any person because he or she made a complaint or testified, assisted, or participated in an investigation or conciliation under this part or an administrative proceeding under Part 180, is a discriminatory housing practice that is prohibited under section 818 of the Fair Housing Act.

Section 103.50 Notification of respondent; joinder of additional or substitute respondents.

(a) Within ten days of the filing of a complaint under Sec. 103.40 or the filing of an amended complaint under Sec. 103.42, the Assistant Secretary will serve a notice on each respondent by certified mail or by personal service. A person who is not named as a respondent in a complaint, but who is identified in the course of the investigation under Subpart D of this part as a person who is alleged to be engaged, to have engaged, or to be about to engage in the discriminatory housing practice upon which the complaint is based may be joined as an additional or substitute respondent by service of a notice on the person under this section within ten days of the identification.

(b)(1) The notice will identify the alleged discriminatory housing practice upon which the complaint is based, and

include a copy of the complaint.

(2) The notice will state the date that the complaint was accepted for filing.

(3) The notice will advise the respondent of the time limits applicable to complaint processing under this part and of the procedural rights and obligations of the respondent under this part and Part 180, including the opportunity to submit an answer to the complaint within 10 days of the receipt of the notice.

(4) The notice will advise the respondent of the aggrieved person's right to commence a civil action under section 813 of the Fair Housing Act in an appropriate United States District Court, not later than two years after the occurrence or termination of the alleged discriminatory housing practice. The notice will state that the computation of this two-year period excludes any time during which a proceeding is pending under this part or Part 180 with respect to a complaint or charge based on the alleged discriminatory housing practice. The notice will also state that the time period includes the time during which an action arising from a breach of a conciliation agreement under section 814(b)(2) of the Fair Housing Act is pending.

(5) If the person is not named in the complaint, but is being joined as an additional or substitute respondent, the notice will explain the basis for the Assistant Secretary's belief that the joined person is properly joined as a respondent.

(6) The notice will advise the respondent that retaliation against any person because he or she made a complaint or testified, assisted or participated in an investigation or conciliation under this part or an administrative proceeding under Part 180, is a discriminatory housing practice that is prohibited under section 818 of the Fair Housing Act.

Section 103.200 Investigations.

(a) Upon the filing of a complaint under Sec. 103.40, the

Assistant Secretary will initiate an investigation. The purposes of an investigation are:

(1) To obtain information concerning the events or transactions that relate to the alleged discriminatory housing practice identified in the complaint.

(2) To document policies or practices of the respondent involved in the alleged discriminatory housing practice raised in the complaint.

(3) To develop factual data necessary for the General Counsel to make a determination under Sec. 103.400 whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, and for the Assistant Secretary to make a determination under Sec. 103.400 that no reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, and to take other actions provided under this part.

Section 103.225 Completion of investigation.

The investigation will remain open until a determination is made under Sec. 103.400, or a conciliation agreement is executed and approved under Sec. 103.310. Unless it is impracticable to do so, the Assistant Secretary will complete the investigation of the alleged discriminatory housing practice within 100 days of the filing of the complaint (or where the Assistant Secretary reactivates the complaint, within 100 days after service of the notice of reactivation under Sec. 103.115). If the Assistant Secretary is unable to complete the investigation within the 100-day period, HUD will notify the aggrieved person and the respondent, by mail, of the reasons for the delay.

Section 103.230 Final investigative report.

(c) Notwithstanding the prohibitions and requirements with respect to disclosure of information contained in Sec. 103.330, the Assistant Secretary will make information

derived from an investigation, including the final investigative report, available to the aggrieved person and the respondent. Following the completion of investigation, the Assistant Secretary shall notify the aggrieved person and the respondent that the final investigation report is complete and will be provided upon request.

Section 103.300 Conciliation.

(a) During the period beginning with the filing of the complaint and ending with the filing of a charge or the dismissal of the complaint by the General Counsel or the Assistant Secretary, the Assistant Secretary will, to the extent feasible, attempt to conciliate the complaint.

(c) Generally, officers, employees, and agents of HUD engaged in the investigation of a complaint under this part will not participate or advise in the conciliation of the same complaint or in any factually related complaint. Where the rights of the aggrieved party and the respondent can be protected and the prohibitions with respect to the disclosure of information can be observed, the investigator may suspend fact finding and engage in efforts to resolve the complaint by conciliation.

Section 103.330 Prohibitions and requirements with respect to disclosure of information obtained during conciliation.

(a) Except as provided in paragraph (b) of this section and Sec. 103.230(c), nothing that is said or done in the course of conciliation under this part may be made public or used as evidence in a subsequent administrative hearing under Part 180 or in civil actions under Title VIII of the Fair Housing Act, without the written consent of the persons concerned.

(b) Conciliation agreements shall be made public, unless the aggrieved person and respondent request nondisclosure and the Assistant Secretary determines that disclosure is not

required to further the purposes of the Fair Housing Act. Notwithstanding a determination that disclosure of a conciliation agreement is not required, the Assistant Secretary may publish tabulated descriptions of the results of all conciliation efforts.

Section 103.400 Reasonable cause determination.

(a) If a conciliation agreement under Section 103.310 has not been executed by the complainant and the respondent, and approved by the Assistant Secretary, the General Counsel, within the time limits set forth in paragraph (c) of this section, shall determine whether, based on the totality of the factual circumstances known at the time of the decision, reasonable cause exists to believe that discriminatory housing practice has occurred or is about to occur. The reasonable cause determination will be based solely on the facts concerning the alleged discriminatory housing practice, provided by complainant and respondent and otherwise, disclosed during the investigation. In making the reasonable cause determination, the General Counsel shall consider whether the facts concerning the alleged discriminatory housing practice are sufficient to warrant the initiation of a civil action in Federal court.

(1) In all cases not involving the legality of local zoning or land use laws or ordinances:

(i) If the General Counsel determines that reasonable cause exists, the General Counsel will immediately issue a charge under Section 103.405 on behalf of the aggrieved person and shall notify the aggrieved person and the respondent of this determination by certified mail or personal service.

(ii) If the General Counsel determines that no reasonable cause exists, the General Counsel shall issue a short and plain written statement of the facts upon which the General Counsel has based the no reasonable cause determination; dismiss the complaint; notify the aggrieved person and the respondent of

the dismissal (including the written statement of facts) by certified mail or personal service; and make public disclosure of the dismissal. Public disclosure of the dismissal shall be by issuance of a press release, except that the respondent may request that no release be made. Notwithstanding a respondent's request that no press release be issued, the fact of the dismissal, including the names of the parties, shall be public information available on request.

(2) If the General Counsel determines that the matter involves the legality of local zoning or land use laws or ordinances, the General Counsel, in lieu of making a determination regarding reasonable cause, shall refer the investigative materials to the Attorney General for appropriate action under Section 814(b)(1) of the Fair Housing Act, and shall notify the aggrieved person and the respondent of this action by certified mail or personal service.

(b) The General Counsel may not issue a charge under paragraph (a) of this section regarding an alleged discriminatory housing practice, if an aggrieved person has commenced a civil action under an Act of Congress or a State law seeking relief with respect to the alleged discriminatory housing practice, and the trial in the action has commenced. If a charge may not be issued because of the commencement of such a trial, the General Counsel will so notify the aggrieved person and the respondent by certified mail or personal service.

(c)(1) The General Counsel shall make the reasonable cause determination after the Assistant Secretary forwards the matter for consideration. The General Counsel shall make a reasonable cause determination within 100 days after filing of the complaint (or where the Assistant Secretary has reactivated a complaint, within 100 days after service of the notice of reactivation under Section 103.115), unless it is impracticable to do so.

(2) If the General Counsel is unable to make the determination within the 100-day period specified in paragraph (c)(1) of this section, the Assistant Secretary will notify the aggrieved person and the respondent by certified mail or personal service, of the reasons for the delay.

Section 103.405 Issuance of Charge.

(a) A charge:

(1) Shall consist of a short and plain written statement of the facts upon which the General Counsel has found reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur;

(2) Shall be based on the final investigative report; and

(3) Need not be limited to facts or grounds that are alleged in the complaint filed under subpart B of this part. If the charge is based on grounds that are not alleged in the complaint, HUD will not issue a charge with regard to the grounds unless the record of the investigation demonstrates that the respondent has been given notice and an opportunity to respond to the allegation.

(b) Within three business days after the issuance of the charge, the General Counsel shall:

(1) Obtain a time and place for hearing from the Chief Docket Clerk of the Office of Administrative Law Judges;

(2) File the charge along with the notifications described in Sec. 104.410(b) with the Office of Administrative Law Judges;

(3) Serve the charge and notifications in accordance with 24 CFR 104.410(a); and

(4) Notify the Assistant Secretary of the filing of the charge.

Section 104.590. Subpoenas

(a) In General. This section governs the issuance of subpoenas in administrative proceedings under this part.

Except for time periods stated in the section rules, to the extent that this rule conflicts with procedures for the issuance of subpoenas in civil actions in the United States District Court for the District in which the investigation of the discriminatory housing practice took place, the rules of the United States District Court apply.

(b) Issuance of subpoena. Upon the written request of a party, the Chief Administrative Law Judge or the presiding Administrative Law Judge may issue a subpoena requiring (1) The attendance of a witness for the purpose of giving testimony at a deposition; (2) The attendance of a witness for the purpose of giving testimony at a hearing; and (3) The production of relevant books, papers, documents or tangible things.

(c) Time of request. Requests for subpoenas in aid of discovery must be submitted in time to permit the conclusion of discovery 15 days before the date scheduled for the hearing. If a request for subpoenas of a witness for testimony at a hearing is submitted three days or less before the hearing, the subpoena shall be issued at the discretion of the Chief Administrative Law Judge or the presiding Administrative Law Judge, as appropriate.

(d) Service. A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service on a person shall be made by delivering a copy of the subpoena to the person and by tendering witness fees and mileage to that person. When the subpoena is issued on behalf of HUD, witness fees and mileage need not be tendered with the subpoena.

(e) Amount of witness fees and mileage. A witness summoned by a subpoena issued under this part is entitled to the same witness and mileage fees as a witness in proceedings in United States District Courts. Fees payable to a witness summoned by a subpoena shall be paid by the party requesting the issuance of the subpoena, or where the ALJ

determines that a party is unable to pay the fees, the fees shall be paid by the Department.

(f) Motion to quash or limit subpoena. Upon a motion by the person served with a subpoena or by a party, made within five days after service of the subpoena (but in any event not less than the time specified in the subpoena for compliance), the Administrative Law Judge may:

(1) Quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown; or

(2) Condition denial of the motion upon the advancement, by the party on whose behalf the subpoena was issued, of the reasonable cost of producing subpoenaed books, papers or documents. Where circumstances require, the Administrative Law Judge may act upon such a motion at any time after a copy of the motion has been served upon the party on whose behalf the subpoena was issued.

(g) Failure to comply with subpoena. If a person fails to comply with a subpoena issued under this section, the party requesting the subpoena may refer the matter to the Attorney General for enforcement in appropriate proceedings under Section 814(c) of the Fair Housing Act.

APPENDIX G

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Dionne Staples,	)	
Charging Party,	)	
v.	)	HUDALJ. 05-90-0879-1
Michael P. Kelly John T. Kelly James Kelly d/b/a Michael P. Kelly Realty	)	
Respondents.	)	

ANSWER OF RESPONDENT
JOHN T. KELLY TO COMPLAINT

Now comes the Respondent, by and through undersigned counsel, and for his answer to the Complaint, states as follows:

1. Paragraphs 1 through 4 do not require a responsive pleading as same are a recitation of law that may or may not be applicable to this Respondent.

2. Denies for lack of knowledge the allegations contained in Paragraph 5 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

3. Admits that Michael P. Kelly and John T. Kelly are owners of 6300 Montgomery Road, Cincinnati, Ohio, but denies the remaining allegations contained in Paragraph 6.

4. Admits the physical description of the building but denies for lack of knowledge the allegations contained in Paragraph 7 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

5. Denies for lack of knowledge the allegations contained in Paragraph 8 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

6. Denies for lack of knowledge the allegations contained in Paragraph 9 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

7. Denies the allegations contained in Paragraph 10 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

8. Denies for lack of knowledge the allegations contained in Paragraph 11 and is unable to obtain sufficient

information to admit or deny each allegation made in the charge.

9. Denies for lack of knowledge Paragraph 12 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

10. Admits the allegation contained in Paragraph 13 of the Complaint.

11. Denies the allegations contained in Paragraphs 14, 15, 16, 17 and 18 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

12. The Charging Party has failed to obtain service of the initial Complaint or Amended Complaints within the time period required by law. The Respondent was not served with any Complaint or Amended Complaints within the time limits prescribed by 24 CFR Sections 103.40 or 103.50, i.e. within ten days of the filing of the Complaint by the aggrieved party.

SECOND AFFIRMATIVE DEFENSE

13. The Charging Party has failed to serve the Respondent either by certified mail or personal service as required by law. The Charging Party has failed to serve the Respondent with the Complaint or Amended Complaints by certified mail service or by personal service as required by 24 CFR Sections 103.45 and 103.50.

THIRD AFFIRMATIVE DEFENSE

14. The Charging Party's initial Complaint or Amended Complaints fail to allege with specificity the alleged discriminatory housing practice that gives rise to the Complaint or Amended Complaints. The Complaint does not

set forth a refusal to rent due to familial status, even if the Complaint or Amended Complaints are accepted as true.

FOURTH AFFIRMATIVE DEFENSE

15. The Charging Party has used information from a conciliation meeting to obtain evidence as the foundation for the Complaint of the alleged aggrieved party in violation of 24 CFR Section 103.330. The investigatory report at page 4 makes reference to a conciliation conference and a reference to Tab II, D 1, which this Respondent has not been provided, and its contents are unknown.

FIFTH AFFIRMATIVE DEFENSE

16. The Charging Party has failed to conduct an investigation within the requirements of 24 CFR Section 103.200. The investigation based on the information contained in the investigative report demonstrates that no factual data has been obtained as a result of information obtained to document any policy or practice of this Respondent, or that this Respondent was served with a Complaint or Amended Complaints, and therefore the investigator has failed to develop factual data necessary for the General Counsel to make a reasonable cause determination.

SIXTH AFFIRMATIVE DEFENSE

17. The Charging Party has failed to complete its investigation within the time requirements of 24 CFR Section 103.225. The investigation must be completed within "100 days of the filing of the Complaint" or arguably the last Amended Complaint which is dated November 5, 1990. The investigation should have been completed on or before February 13, 1991, or the Respondent is required to be notified by certified mail or personal service. The investigation was not completed within 100 days, and no

notice was sent or served on this Respondent "of the reasons for the delay."

SEVENTH AFFIRMATIVE DEFENSE

18. The Charging Party has failed to notify the Respondent of the completion of the investigatory report or notify the Respondent that it was impracticable to complete the investigative report within 100 days. 24 CFR Section 103.225 requires the Assistant Secretary to notify the Respondent that the final investigation report is completed or that the investigation report would be provided upon request.

EIGHTH AFFIRMATIVE DEFENSE

19. The Charging Party is guilty of laches for failure to promptly investigate, complete the investigatory process, and issue a determination of reasonable cause within the requirements of the Code of Federal Regulations and therefore is barred from any recovery. The Charging Party has failed to complete its investigation within 100 days of the filing of the Complaint or last Amended Complaint or issue a determination of probable cause within 100 days of the filing of the Complaint or the last Amended Complaint.

NINTH AFFIRMATIVE DEFENSE

20. The Charging Party did not initiate or make a probable cause determination within 100 days of the filing of the Complaint or notify Respondent of its failure to do so. The reasonable cause determination was not made until March 2, 1992, which is more than sixteen months from the filing of the last Amended Complaint and without notification from the Assistant Secretary by certified mail or personal service of the reasons for the delay.

TENTH AFFIRMATIVE DEFENSE

21. The Charging Party has failed to join parties

necessary for just adjudication pursuant to Rule 19 and 19.1 of the Federal Rules of Civil Procedure. Kathie Kelly is an owner of the property that is the subject of this dispute, and service of the Complaint, Amended Complaints or Reasonable Cause Determination has not been made on her.

ELEVENTH AFFIRMATIVE DEFENSE

22. The Charging Party has failed, after demand in writing, to provide Respondent with a complete copy of the investigatory report compiled in this proceeding. The Respondent, through counsel, has requested a copy of the investigative report pursuant to 24 CFR Section 103.230, and each investigative report forwarded to counsel or another Respondent did not contain the tabs referenced in the report, thereby constituting a refusal by the Assistant Secretary to provide a complete copy of the investigative report.

TWELFTH AFFIRMATIVE DEFENSE

23. The Charging Party has failed to document with specificity any actions on behalf of this responding party to document a policy or practice related to the Complaint. The investigative report is devoid of any documentation that there was a practice or policy that was discriminatory, or that there was a refusal to rent any apartment in contravention of the Fair Housing Act.

THIRTEENTH AFFIRMATIVE DEFENSE

24. The Charging Party, HUD, has failed to comply with its own rules and regulations (see prior affirmative defenses), thereby barring it from initiating any action against this Respondent until the Charging Party, HUD, complies with same. HUD has failed to fulfill its obligations and cannot initiate action until it complies with its own rules and guidelines.

FOURTEENTH AFFIRMATIVE DEFENSE

25. The Charging Party's Complaint or Determination of Reasonable Cause and Charge of Discrimination fails to state a claim upon which relief can be granted. The apartment was never denied to the alleged aggrieved party by any of the Respondents, and therefore no discriminatory practice existed, then or now.

FIFTEENTH AFFIRMATIVE DEFENSE

26. The Charging Party has failed to notify the Respondents of the basis for the Assistant Secretary's belief that the person is properly joined as a respondent. The Charging Party failed to notify this Respondent of the basis for the Assistant Secretary's belief that he should be joined as a party, nor did the notice identify the alleged discriminatory practice.

SIXTEENTH AFFIRMATIVE DEFENSE

27. Respondent does not now own nor has he ever owned any interest in Michael P. Kelly Realty. This Respondent has not now nor has he ever been an agent, principal or employee of Michael P. Kelly Realty.

SEVENTEENTH AFFIRMATIVE DEFENSE

28. Respondent has never had a contractual relationship or business relationship permitting Michael P. Kelly Realty to represent, rent or lease the real property at 6300 Montgomery Road. Michael P. Kelly Realty does not now or ever has had a contractual relationship for the rental of any properties at 6300 Montgomery Road, Cincinnati, Ohio.

EIGHTEENTH AFFIRMATIVE DEFENSE

29. The Charging Party's damages, if any, which this Respondent specifically denies, are a direct and proximate

result of the Charging Party's contributory negligence. The Charging Party has failed to comply with its own rules, thereby occasioning any loss it may suffer, and the Charging Party's refusal to pursue rental of the unit or submission of a rental application occasioned any loss incurred by the Charging Party.

NINETEENTH AFFIRMATIVE DEFENSE

30. The Charging Party has unclean hands and violated the Respondent's due process rights. The Charging Party has repeatedly failed to notify this Respondent of any proceedings in this matter, thereby depriving him of rights entitled to him pursuant to the 14th Amendment of the Constitution of the United States of America and the laws of the United States of America.

TWENTIETH AFFIRMATIVE DEFENSE

31. The application of the Fair Housing Act to this Respondent is a denial of equal protection to this Respondent, as there is not any uniform application to all geographic cites throughout Hamilton County, not to mention the United States. The application of the Fair Housing Act in one municipality due to minimum space requirements can constitute a violation of the Fair Housing Act, while its application in an adjoining municipality with the same number of potential dwellers would not constitute a violation.

TWENTY-FIRST AFFIRMATIVE DEFENSE

32. The Charging Party has failed to serve the Respondent within the time requirements of 24 CFR Section 103.405. The General Counsel failed to serve the Determination of Reasonable Cause upon the Respondents within three business days of the issuance of the charge.

TWENTY-SECOND AFFIRMATIVE DEFENSE

33. This tribunal lacks subject matter jurisdiction due to the failure of the Charging Party to comply with its own rules and regulations.

TWENTY-THIRD AFFIRMATIVE DEFENSE

34. The Charging Party's Complaint is barred by the statute of limitations for failure to file a claim within applicable time limits.

WHEREFORE, this Respondent, having fully answered the Charging Party's Complaint, requests that it be dismissed at the Charging Party's expense and for such other relief as the Court deems just and proper and for expenses incurred as a result of defending this action.

/s/
ROBERT G. KELLY
State I.D. #0002167
4353 Montgomery Road
Norwood, Ohio 45212
(513) 531-3636
Attorney for Respondent
John T. Kelly

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer was sent by certified mail, return receipt requested, to Konrad J. Rayford, Esq., Attorney Advisor, U.S. Department of Housing and Urban Development, 77 West Jackson Boulevard, Room 2604, Chicago, Illinois 60604-3507, Gordon H. Mansfield, Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development , 451 Seventh Street, S.W., Room 5204, Washington, D. C. 20410, and Michael J. Mooney, Attorney for Dionne Staples, The Nathaniel Ropes Building, 917 Main Street, Cincinnati, Ohio 45202-1314 this 3rd day of April 1992. In addition, the original of this document was filed with the Chief Docket Clerk, Office of Administrative Law Judges, U.S. Department of Housing and Urban Development, P.O. Box 44820, Washington, D. C. 20026-4820 by certified mail and a copy by regular mail on the foregoing date.

/s/ _____
ROBERT G. KELLY

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Dionne Staples,	)	
Charging Party,	)	
v.	)	HUDALJ. 05-90-0879-1
Michael P. Kelly John T. Kelly James Kelly d/b/a Michael P. Kelly Realty	)	
Respondents.	)	

ANSWER OF RESPONDENT
MICHAEL P. KELLY TO COMPLAINT

Now comes the Respondent, by and through undersigned counsel, and for his answer to the Complaint, states as follows:

1. Paragraphs 1 through 4 do not require a responsive pleading as same are a recitation of law that may or may not be applicable to this Respondent.

2. Denies for lack of knowledge the allegations contained in Paragraph 5 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

3. Admits that Michael P. Kelly and John T. Kelly are owners of 6300 Montgomery Road, Cincinnati, Ohio, but denies the remaining allegations contained in Paragraph 6.

4. Admits the physical description of the building but denies for lack of knowledge the allegations contained in Paragraph 7 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

5. Denies for lack of knowledge the allegations contained in Paragraph 8 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

6. Denies for lack of knowledge the allegations contained in Paragraph 9 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

7. Denies the allegations contained in Paragraph 10 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

8. Denies for lack of knowledge the allegations contained in Paragraph 11 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

9. Denies for lack of knowledge Paragraph 12 and is unable to obtain sufficient information to admit or deny each allegation made in the charge.

10. Admits the allegation contained in Paragraph 13 of the Complaint.

11. Denies the allegations contained in Paragraphs 14, 15, 16, 17 and 18 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

12. The Charging Party has failed to obtain service of the initial Complaint or Amended Complaints within the time period required by law. The Respondent was not served with any Complaint or Amended Complaints within the time limits prescribed by 24 CFR Sections 103.40 or 103.50, i.e. within ten days of the filing of the Complaint by the aggrieved party.

SECOND AFFIRMATIVE DEFENSE

13. The Charging Party has failed to serve the Respondent either by certified mail or personal service as required by law. The Charging Party has failed to serve the Respondent with the Complaint or Amended Complaints by certified mail service or by personal service as required by 24 CFR Sections 103.45 and 103.50.

THIRD AFFIRMATIVE DEFENSE

14. The Charging Party's initial Complaint or Amended Complaints fail to allege with specificity the alleged discriminatory housing practice that gives rise to the Complaint or Amended Complaints. The Complaint does not set forth a refusal to rent due to familial status, even if the Complaint or Amended Complaints are accepted as true.

FOURTH AFFIRMATIVE DEFENSE

15. The Charging Party has used information from a conciliation meeting to obtain evidence as the foundation for the Complaint of the alleged aggrieved party in violation of 24 CFR Section 103.330. The investigatory report at page 4 makes reference to a conciliation conference and a reference to Tab II, D 1, which this Respondent has not been provided, and its contents are unknown.

FIFTH AFFIRMATIVE DEFENSE

16. The Charging Party has failed to conduct an investigation within the requirements of 24 CFR Section 103.200. The investigation based on the information contained in the investigative report demonstrates that no factual data has been obtained as a result of information obtained to document any policy or practice of this Respondent, or that this Respondent was served with a Complaint or Amended Complaints, and therefore the investigator has failed to develop factual data necessary for the General Counsel to make a reasonable cause determination.

SIXTH AFFIRMATIVE DEFENSE

17. The Charging Party has failed to complete its investigation within the time requirements of 24 CFR Section 103.225. The investigation must be completed within "100 days of the filing of the Complaint" or arguably the last Amended Complaint which is dated November 5, 1990. The investigation should have been completed on or before February 13, 1991, or the Respondent is required to be notified by certified mail or personal service. The investigation was not completed within 100 days, and no notice was sent or served on this Respondent "of the reasons for the delay."

SEVENTH AFFIRMATIVE DEFENSE

18. The Charging Party has failed to notify the Respondent of the completion of the investigatory report or notify the Respondent that it was impracticable to complete the investigative report within 100 days. 24 CFR Section 103.225 requires the Assistant Secretary to notify the Respondent that the final investigation report is completed or that the investigation report would be provided upon request.

EIGHTH AFFIRMATIVE DEFENSE

19. The Charging Party is guilty of laches for failure to promptly investigate, complete the investigatory process, and issue a determination of reasonable cause within the requirements of the Code of Federal Regulations and therefore is barred from any recovery. The Charging Party has failed to complete its investigation within 100 days of the filing of the Complaint or last Amended Complaint or issue a determination of probable cause within 100 days of the filing of the Complaint or the last Amended Complaint.

NINTH AFFIRMATIVE DEFENSE

20. The Charging Party did not initiate or make a probable cause determination within 100 days of the filing of the Complaint or notify Respondent of its failure to do so. The reasonable cause determination was not made until March 2, 1992, which is more than sixteen months from the filing of the last Amended Complaint and without notification from the Assistant Secretary by certified mail or personal service of the reasons for the delay.

TENTH AFFIRMATIVE DEFENSE

21. The Charging Party has failed to join parties necessary for just adjudication pursuant to Rule 19 and 19.1 of the Federal Rules of Civil Procedure. Kathie Kelly is an owner of the property that is the subject of this dispute, and

service of the Complaint, Amended Complaints or Reasonable Cause Determination has not been made on her.

ELEVENTH AFFIRMATIVE DEFENSE

22. The Charging Party has failed, after demand in writing, to provide Respondent with a complete copy of the investigatory report compiled in this proceeding. The Respondent, through counsel, has requested a copy of the investigative report pursuant to 24 CFR Section 103.230, and each investigative report forwarded to counsel or another Respondent did not contain the tabs referenced in the report, thereby constituting a refusal by the Assistant Secretary to provide a complete copy of the investigative report.

TWELFTH AFFIRMATIVE DEFENSE

23. The Charging Party has failed to document with specificity any actions on behalf of this responding party to document a policy or practice related to the Complaint. The investigative report is devoid of any documentation that there was a practice or policy that was discriminatory, or that there was a refusal to rent any apartment in contravention of the Fair Housing Act.

THIRTEENTH AFFIRMATIVE DEFENSE

24. The Charging Party, HUD, has failed to comply with its own rules and regulations (see prior affirmative defenses), thereby barring it from initiating any action against this Respondent until the Charging Party, HUD, complies with same. HUD has failed to fulfill its obligations and cannot initiate action until it complies with its own rules and guidelines.

FOURTEENTH AFFIRMATIVE DEFENSE

25. The Charging Party's Complaint or Determination of Reasonable Cause and Charge of

Discrimination fails to state a claim upon which relief can be granted. The apartment was never denied to the alleged aggrieved party by any of the Respondents, and therefore no discriminatory practice existed, then or now.

FIFTEENTH AFFIRMATIVE DEFENSE

26. The Charging Party has failed to notify the Respondents of the basis for the Assistant Secretary's belief that the person is properly joined as a respondent. The Charging Party failed to notify this Respondent of the basis for the Assistant Secretary's belief that he should be joined as a party, nor did the notice identify the alleged discriminatory practice.

SIXTEENTH AFFIRMATIVE DEFENSE

27. Respondent has never had a contractual relationship or business relationship permitting Michael P. Kelly Realty to represent, rent or lease the real property at 6300 Montgomery Road. Michael P. Kelly Realty does not now or ever has had a contractual relationship for the rental of any properties at 6300 Montgomery Road, Cincinnati, Ohio.

SEVENTEENTH AFFIRMATIVE DEFENSE

28. The Charging Party's damages, if any, which this Respondent specifically denies, are a direct and proximate result of the Charging Party's contributory negligence. The Charging Party has failed to comply with its own rules, thereby occasioning any loss it may suffer, and the Charging Party's refusal to pursue rental of the unit or submission of a rental application occasioned any loss incurred by the Charging Party.

EIGHTEENTH AFFIRMATIVE DEFENSE

29. The Charging Party has unclean hands and

violated the Respondent's due process rights. The Charging Party has repeatedly failed to notify this Respondent of any proceedings in this matter, thereby depriving him of rights entitled to him pursuant to the 14th Amendment of the Constitution of the United States of America and the laws of the United States of America.

NINETEENTH AFFIRMATIVE DEFENSE

30. The application of the Fair Housing Act to this Respondent is a denial of equal protection to this Respondent, as there is not any uniform application to all geographic cites throughout Hamilton County, not to mention the United States. The application of the Fair Housing Act in one municipality due to minimum space requirements can constitute a violation of the Fair Housing Act, while its application in an adjoining municipality with the same number of potential dwellers would not constitute a violation.

TWENTIETH AFFIRMATIVE DEFENSE

31. The Charging Party has failed to serve the Respondent with a copy of the determination of reasonable cause in conformity of 24 CFR Section 103.405. The Charging Party has repeatedly failed to serve the Respondent at his last known address or residence. The Charging Party does not have service upon this Respondent.

TWENTY-FIRST AFFIRMATIVE DEFENSE

32. This tribunal lacks subject matter jurisdiction due to the failure of the Charging Party to comply with its own rules and regulations.

TWENTY-SECOND AFFIRMATIVE DEFENSE

33. The Charging Party's Complaint is barred by the statute of limitations for failure to file a claim within applicable time limits.

WHEREFORE, this Respondent, having fully answered the Charging Party's Complaint, requests that it be dismissed at the Charging Party's expense and for such other relief as the Court deems just and proper and for expenses incurred as a result of defending this action.

/s/

ROBERT G. KELLY
State I.D. #0002167
4353 Montgomery Road
Norwood, Ohio 45212
(513) 531-3636
Attorney for Respondent
Michael P. Kelly

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer was sent by certified mail, return receipt requested, to Konrad J. Rayford, Esq., Attorney Advisor, U.S. Department of Housing and Urban Development, 77 West Jackson Boulevard, Room 2604, Chicago, Illinois 60604-3507, Gordon H. Mansfield, Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development , 451 Seventh Street, S.W., Room 5204, Washington, D. C. 20410, and Michael J. Mooney, Attorney for Dionne Staples, The Nathaniel Ropes Building, 917 Main Street, Cincinnati, Ohio 45202-1314 this 3rd day of April 1992. In addition, the original of this document was filed with the Chief Docket Clerk, Office of Administrative Law Judges, U.S. Department of Housing and Urban Development, P.O. Box 44820, Washington, D. C. 20026-4820 by certified mail and a copy by regular mail on the foregoing date.

/s/_____
ROBERT G. KELLY

APPENDIX H

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Dionne Staples,	)	
Charging Party,	)	
v.	)	HUDALJ. 05-90-0879-1
Michael P. Kelly John T. Kelly James Kelly d/b/a Michael P. Kelly Realty	)	
Respondents.	)	

MOTION OF RESPONDENT JOHN T. KELLY TO DISMISS DETERMINATION OF REASONABLE CAUSE AND CHARGE OF DISCRIMINATION AND REQUEST FOR A PROTECTIVE ORDER

Now comes the Respondent, by and through undersigned counsel, and moves the Court for an order dismissing the Determination of Reasonable Cause and Charge of Discrimination and for a Protective Order that he not be required to answer or otherwise respond to any request for discovery of any kind. The interrogatories, requests for admissions and request for production of documents are unduly burdensome, and the Charging Party did not perfect service of the initial complaint on the Respondent.

/S/_____
ROBERT G. KELLY (0002167)
4353 Montgomery Road
Norwood, Ohio 45212
(513) 531-3636
Attorney for Respondent John T. Kelly

MEMORANDUM

I. FAILURE TO SERVE THE COMPLAINT WITHIN TEN DAYS OF FILING

The Charging Party is required to serve within ten days of the filing of the complaint notice of the complaint on a Respondent by certified mail or personal service. 24 CFR 103.50. The Code of Federal Regulations defines personal service as "handing a copy of the document to the person to be served or leaving a copy of the document with a person of suitable age and discretion at the place of business. . . " 24 CFR 103.9. The regulations governing this action further require that if a person is not named in the complaint but is being joined as an additional or substitute Respondent, the notice will explain the basis for the Assistant Secretary's

belief that the person is properly joined as a Respondent. 24 CFR 103.50.

In the instant case, the Charging Party has not served this Respondent by certified mail or personal service and cannot produce a scintilla of proof that service was made. This Respondent works in the same building as the investigator and yet service was neither attempted nor perfected at Respondent's place of business. It is clear that the Charging Party's service of the complaint or amended complaint is defective, and whether this Respondent had actual knowledge of the action does not cure the defective service. Friedman vs. Estate of Jackie Presser, 929 F. 2d 1151 (6th Circuit 1991).

The Charging Party is required to serve the Respondent within ten (10) days of the filing of the complaint or amended complaint naming him as a party. In the instant case, the complaint naming this individual as a Respondent was filed May 17, 1990, and should have been served upon him by certified mail or personal service on or before May 27, 1990. Arguably, it would be splitting hairs if the discussion centered on a delay of seven or fourteen days. In this case, the discussion concerns a delay of six hundred ninety-seven days as of April 23, 1992, and it continues to grow daily.[11]

The procedural deficiency and the failure of HUD to follow its own rules has resulted in significant injury to this Respondent. This Respondent has been denied the opportunity to respond to the charge or participate in any conciliation with the knowledge that he was a named party as

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[11] Calculated as follows:
May 27, 1990 through December 31, 1990 = 218 days
January 1, 1991 through December 31, 1991 = 365 days
January 1, 1992 through April 23, 1992 = 114 days

countenanced by the Fair Housing Act and effectively denied this Respondent his due process rights. It is not the responsibility of this Respondent to seek out HUD or any government-regulatory agency to secure service of process. Baumgardner vs. The Secretary, United States Department of Housing and Urban Development, No. 91-3039, 6th Circuit, 1992.[12] Moreover, although the Court in the Baumgardner case dealt with an "inadequate and insufficient statutory notice," this Court must concern itself with a case in which there has been no statutory notice. Certainly due process at the bare minimum requires "notice" as contemplated in the Code of Federal Regulations.

HUD'S investigator attempted service of the first amended complaint by sending it to 3330 Erie Avenue. This address is the location of Michael P. Kelly Realty. This Respondent has no business or contractual relationship with Michael P. Kelly Realty. This Respondent replied to the amended complaint with indignation, because he perceived that he was providing assistance to Michael P. Kelly when he was broadsided by the knowledge that he was named as a Respondent. Although the complaint came into the hands of the Respondent, he was not served in accordance with the regulations. To date, this Respondent has not been served with the second amended complaint naming James Kelly as an additional Respondent.

II. FAILURE TO COMPLETE INVESTIGATION WITHIN 100 DAYS

The regulations governing these actions require that the investigation be completed within one hundred (100) days of the filing of the complaint. This period can be extended if

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[12]The same investigator is involved in the instant case as in the Baumgardner case.

the Assistant Secretary notifies the aggrieved person and the Respondent. 24 CFR 103.225.

The record in this action indicates that the initial complaint was filed with HUD on May 17, 1990, an amended complaint filed on or about July 27, 1990, and the final amended complaint filed November 5, 1990, naming this James Kelly as an additional party. The Assistant Secretary was required to complete the investigation within 100 days of November 5, 1990, unless this Respondent was notified by certified mail of the reason why the investigation could not be completed within that time frame. This Respondent did not receive any notification as to why the investigation could not be completed within 100 days, nor any notification that the final investigative report was completed as required by 24 CFR 103.225 and 103.230.

The circumstances involving this deficiency are distinctly different from those of the Baumgardner case. In Baumgardner, at least the Respondent received some notice, even though untimely, that the investigation would not be completed in 100 days. In the instant case, HUD continued merrily along with total indifference to the compulsory notice process with regard to this Respondent. Since HUD did not feel compelled to provide this Respondent with notice of the complaint in compliance with its regulations, one can only assume that HUD perceived notice of any delay in the investigatory process to be superfluous. Although the Baumgardner court stated that a little delay is not bad, there is a total absence of any notice in this case. One wonders if a delay of four hundred thirty-six days without notice is sufficient to trigger a Court's sense of indignation.[13]

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[13] The figure was calculated on the assumption that notice of the complaint was provided to this Respondent, which is not the case.February 13, 1991 through February 13, 1992 =

Certainly this tribunal does not disregard the requirements in the Code of Federal Regulations concerning notices to make elections, discovery cut-off dates and answer dates. The question that requires an answer in this instance: Why wink at or disregard investigation times? The haphazard selection of regulations that will be enforced and those that will not be enforced imperils this Respondent at the hands of a government agency that does not even comply with its own regulations. Evidently HUD has embarked on a system of "Do as I say, not as I do." Certainly to countenance this type of slipshod investigation and failure to comply with its regulations will only reinforce an attitude within HUD that the rules are made to apply to outsiders but not to the agency.

III. FAILURE TO MAKE REASONABLE CAUSE DETERMINATION WITHIN 100 DAYS OF FILING OF COMPLAINT

Section 103.400 of the Code of Federal Regulations is specific and mandatory that the General Counsel shall make a reasonable cause determination within 100 days of the filing of the complaint. In the event that the General Counsel is unable to do so, the Assistant Secretary must notify the aggrieved person and the Respondent by certified mail or personal service of the reasons for the delay. 24 CFR 103.400 (c) (2).

The record in this case demonstrates from the Charging Party's complaint or determination of reasonable cause that it has failed to meet or comply with its own regulations. The reasonable cause determination was issued over one year from the date that the investigation should have been completed and over fifteen months from the last

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365 days February 14, 1992 through April 23, 1992 = 70 days
435 days

amended complaint and twenty-two months from the filing of the initial complaint. There is nothing in the file to indicate that any reason for such a delay was communicated to this Respondent as required by the agency's own regulations. It is even more alarming when the Respondent works three floors below the investigator, and the investigator is fully aware of this Respondent's place of employment.

This heedlessness by HUD continues a pattern of absolute disregard of its own regulations. The recipient of the investigatory report, if in fact it was timely completed[14], sat on the investigatory report and did not issue any notice to this Respondent of the reason for the delay. This conduct should not be a shock to any reviewer of this case, based simply on the facts that there is no notice of the complaint, no notice that the investigatory report was complete and no notice of the cause for delay. The action of the person or tribunal who determined reasonable cause only perpetuated a track record of indifference to this Respondent's due process rights, the Code of Federal Regulations and the Fair Housing Act. Bureaucrats should not be allowed to operate in total derogation of the law with no oversight and total impunity.

IV. HUD IS BARRED FROM ISSUING CHARGE OR REASONABLE CAUSE DETERMINATION

Section 103.405 of Title 24 of the Code of Federal Regulations is very specific about the requirements concerning the issuance of charge. Paragraph 3 of the foregoing section states:

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[14]The incomplete investigatory report was undated and not signed, therefore making it difficult to determine when the investigatory report was completed.

> ....HUD will not issue a charge with regard to the grounds unless the record of the investigation demonstrates that the respondent has been given notice and an opportunity to respond to the allegation.

Prior to any action by HUD, it must make a determination that the initial complaint was served in accordance with 24 CFR 103.50.

The record in this matter demonstrates that not only was this Respondent not served, but also that he was thus not provided an opportunity to respond to the allegation. It would appear that HUD's heedless indifference to its own regulations would necessitate dismissal on this ground alone.

The precipitous action of HUD to file a determination of reasonable cause perpetuates a callous disregard of the due process rights of this Respondent. Basic due process dictates that a tenant who is evicted from his apartment is entitled to notice and an opportunity to be heard prior to the termination of his tenancy rights. In the instant case, HUD has deprived this Respondent of his due process rights in absolute derogation of the Respondent's rights entitled by the Code of Federal Regulations and the Fair Housing Act. HUD has failed to give this Respondent notice, and therefore, this charge must be dismissed. To hold otherwise would be to further wink at the strictness of the regulations. If this regulation is not enforced, nothing remains to ensure this Respondent's basic due process rights.

V. FAILURE TO SERVE THE REASONABLE CAUSE DETERMINATION IN COMPLIANCE WITH SECTION 103.405 OF THE CODE OF FEDERAL REGULATIONS

Section 103.405 of the Code of Federal Regulations requires the General Counsel within three business days to, among other requirements:

> (3) Serve the charge and notifications in accordance with 24 CFR 104.40....

Section 104.40 specifies that service of documents may be made by personal service or by mailing a copy to the last known address. The key issue in this section is "last known address" and whether the Charging Party knew or even had the remotest idea of the address of this Respondent.

This Respondent has not received one complaint from the Charging Party in compliance with the regulations. No complaints have been served on him personally or by certified mail. Certainly, the threshold issue concerning the necessity of a party's participation, response to a complaint or requirement to appear should be predicated on notice to him in compliance with the law. It is incumbent upon this tribunal to definitely state that enough is enough. No notice of the complaint, no contact concerning the investigation, no chance for conciliation, no investigative report completed in 100 days of the filing of the complaint or last amended complaint, no notice of extension to complete the investigatory report, no reasonable cause determination completed within 100 days of the complaint or last amended complaint, no notice of need for extension to determine reasonable cause, and to place the cherry on the top of this treat, HUD failed to serve this Respondent with the Determination of Reasonable Cause in

compliance with its regulations. How in the world anyone could even entertain the reasonable cause determination in light of the foregoing atrocities at the expense of the Respondent's due process rights is incomprehensible. Ask not for whom the bell tolls, it tolls for this Respondent's due process rights which have been trampled upon by a bureaucratic process out of control.

In conclusion, this case has been under consideration by HUD for over twenty-three months without service of the complaint upon this Respondent. Elephants have been conceived and born during this time period, yet HUD cannot deliver a notice to this Respondent that a complaint was filed against this Respondent, even though this Respondent works three floors below the investigator. The actions of HUD should neither be condoned nor encouraged by permitting this process to proceed. If the Sixth Circuit was "seriously troubled" in Baumgardner by HUD deficiencies in carrying out statutory proceedings, it will be absolutely appalled by this travesty. This Respondent should be dismissed for all the foregoing reasons.

VI. PROTECTIVE ORDER ARGUMENT

The Respondent has filed a Motion to Dismiss that challenges the jurisdiction and procedures used to bring this case before this tribunal. There are serious and substantial questions concerning the denial of this Respondent's due process rights, and the necessity to respond to the substantive issues involved in this proceeding without first addressing the Respondent's Motion to Dismiss will cause the Respondent to incur unnecessary expense and place a tremendous burden on this Respondent.

Further, this Respondent has not been served with any documents concerning this proceeding. This Respondent has retained an attorney to answer the charge and assert defenses because of the actions of HUD to totally and completely

trample and violate rights secured by the Constitution of the United States of America. This Respondent has not waived any rights and has challenged the jurisdiction of this proceeding among other defenses that he has asserted to this acion.

The Charging Party has inundated this Respondent with discovery requests (Interrogatories, Production of Documents and Requests for Admissions) that are unduly burdensome to this Respondent who has not been properly served by the Charging Party. The Interrogatories are duplicative for each named Respondent. This Respondent strenuously objects to each Interrogatory due to lack of service and to Interrogatory Nos. 11, 12, 13, 14, 15 and 16 as being totally irrelevant to this action, as the only property that is the subject of this action is 6300 Montgomery Road, Cincinnati, Ohio. The Charging Party has embarked upon a fishing expedition to discover other properties owned by this Respondent that are not the subject of this complaint. Interrogatory Nos. 7, 8 and 9 seek to discover the work product of counsel and further violates the attorney-client privilege. Interrogatory No. 28 is the ultimate abuse of the discovery process, as the information is totally irrelevant to the cause of action. Interrogatory No. 27 is understandable, provided there is
service, but No. 28 is purely burdensome and has no evidentiary value.

The Charging Party's request for admissions is another broad-based request to all Respondents. The requests are not relevant to all Respondents and to this Respondent in particular. Once again there is no service on this Respondent, but he is expected to expend time and money to respond.

The Charging Party's Request for Production of Documents is the most burdensome of all the discovery requests. Request No. 4 seeks all documents for the property at 6300 Montgomery Road, Cincinnati, Ohio. Once again,

the only apartment that is the subject of this no-service complaint is No. 10. The Charging Party desires this Respondent to duplicate voluminous records for apartments and tenants that are not the subject of this complaint for a three-year period. Requests Nos. 5 and 7 build upon the outlandish request in No. 4. The Charging Party seeks information of all rental units owned by this Respondent, none of which are the subject of this complaint. Request No. 8 asks this Respondent to produce oral statements. How can the Respondent produce an oral statement? Request No. 11 seeks information subject to the attorney-client privilege, which is not discoverable, and therefore, this Respondent objects.

This Respondent is incurring legal expenses to defend this action that are mounting daily. The duplication costs and fees necessary to reply to the discovery request will only exacerbate a situation that is absolutely and totally out of control. Service on this Respondent has never been perfected, yet HUD is penalizing him by requiring him to expend monies to respond to discovery requests. Due process requires the intervention of this tribunal to halt the abuse of this Respondent's due process rights. HUD is absolutely out of control, and the failure of this tribunal to intervene will cause this Respondent's damages to grow.

This Respondent incorporates by reference his Motion to Dismiss and Memorandum in support of this Motion for a Protective Order. The Memorandum in support of the Motion to Dismiss articulates grave procedural defects that substantially prejudice this Respondent's due process rights and have prejudiced him in making a defense to the merits of the Complaint.

/S/_____
ROBERT G. KELLY
Attorney Registration #0002167
4353 Montgomery Road
Norwood, Ohio 45212
(513) 531-3636
Attorney for Respondent
John T. Kelly

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was sent by regular U.S. mail on the _____day of _____, 1992, to the following individuals:

Konrad J. Rayford, Esq.
Attorney Advisor
U.S. Department of Housing and
Urban Development
77 West Jackson Boulevard, Room 2604
Chicago, Illinois 60604-3507

Gordon H. Mansfield
Assistant Secretary for Fair
Housing and Equal Opportunity
U.S. Department of Housing and
Urban Development
451 Seventh St., S.W., Room 5204
Washington, D. C. 20410

Michael J. Mooney, Esq.
Attorney for Dionne Staples
The Nathaniel Ropes Building
917 Main Street
Cincinnati, Ohio 45202-1314

In addition, the original of this document was filed with the Chief Docket Clerk, Office of Administrative Law Judges, U.S. Department of Housing and Urban Development, 409 3rd Street, S. W., Suite 320, Washington, D. C. 20024 by certified mail and a copy by regular mail on the foregoing date.

/S/_____
ROBERT G. KELLY

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Dionne Staples,	)	
Charging Party,	)	
v.	)	HUDALJ. 05-90-0879-1
Michael P. Kelly John T. Kelly James Kelly d/b/a Michael P. Kelly Realty	)	
Respondents.	)	

MOTION OF RESPONDENT MICHAEL P. KELLY TO DISMISS DETERMINATION OF REASONABLE CAUSE AND CHARGE OF DISCRIMINATION AND REQUEST FOR A PROTECTIVE ORDER

Now comes the Respondent, by and through undersigned counsel, and moves the Court for an order dismissing the Determination of Reasonable Cause and Charge of Discrimination and for a Protective Order that he not be required to answer or otherwise respond to any request for discovery of any kind. The interrogatories, requests for

admissions and request for production of documents are unduly burdensome and the Charging Party did not perfect service of the initial complaint on the Respondent.

/S/_____
ROBERT G. KELLY (0002167)
4353 Montgomery Road
Norwood, Ohio 45212
(513) 531-3636
Attorney for Respondent
Michael P. Kelly

MEMORANDUM

I. FAILURE TO SERVE THE COMPLAINT WITHIN TEN DAYS OF FILING

The Charging Party is required to serve within ten days of the filing of the complaint notice of the complaint on a Respondent by certified mail or personal service. 24 CFR 103.50. The Code of Federal Regulations defines personal service as "handing a copy of the document to the person to be served or leaving a copy of the document with a person of suitable age and discretion at the place of business . . ."24 CFR 103.9. The regulations governing this action further require that if a person is not named in the complaint but is being joined as an additional or substitute Respondent, the notice will explain the basis for the Assistant Secretary's belief that the person is properly joined a Respondent. 24 CFR 103.50.

In the instant case, the Charging Party has not served this Respondent by certified mail or personal service and cannot produce a scintilla of proof that service was made.

The service of the initial complaint was made upon Michael P. Kelly Realty, which is not an entity. It is clear that the Charging Party's service of the complaint or amended complaint is defective, and whether this Respondent had actual knowledge of the action does not cure the defective service. Friedman vs. Estate of Jackie Presser, 929 F. 2d 1151 (6th Circuit 1991).

The Charging Party is required to serve the Respondent within ten (10) days of the filing of the complaint or amended complaint naming him as a party. In the instant case, the complaint naming this individual as a Respondent was filed May 17, 1990, and should have been served upon him by certified mail or personal service on or before May 27, 1990. Arguably, it would be splitting hairs if the discussion centered on a delay of seven or fourteen days. In this case, the discussion concerns a delay of six hundred ninety-seven days as of April 23, 1992, and it continues to grow daily.[15]

The procedural deficiency and the failure of HUD to follow its own rules has resulted in significant injury to this Respondent. It is not the responsibility of this Respondent to seek out HUD or any government regulatory agency to secure service of process. Baumgardner vs. The Secretary, United States Depart-ment of Housing and Urban Development, No. 91-3039, 6th Circuit, 1992.[16] Moreover, although the Court in the Baumgardner case dealt with an "inadequate and

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[15] Calculated as follows:
May 27, 1990 through December 31, 1990 = 218 days
January 1, 1991 through December 31, 1991 = 365 days
January 1, 1992 through April 23, 1992 = 114 days

[16] The same investigator is involved in the instant case as in the Baumgardner case.

insufficient statutory notice, " this Court must concern itself with a case in which there has been no notice. Certainly due process at the bare minimum requires "notice" as contemplated in the Code of Federal Regulations.

HUD's investigator attempted service of the complaint by sending it to 3330 Erie Avenue. This address is the location of Michael P. Kelly Realty. Michael P. Kelly Realty is not a legal entity that can receive process. Although the complaint came into the hands of this Respondent, he was not served in accordance with the regulations. This Respondent has never been served with the second amended complaint naming James Kelly as an additional respondent.

II. FAILURE TO COMPLETE INVESTIGATION WITHIN 100 DAYS

The regulations governing these actions require that the investigation be completed within one hundred (100) days of the filing of the complaint. This period can be extended if the Assistant Secretary notifies the aggrieved person and the Respondent. 24CFR 103.225.

The record in this action indicates that the initial complaint was filed with HUD on May 17, 1990, an amended complaint filed on or about July 27, 1990, and the final amended complaint filed November 5, 1990, naming James Kelly as an additional party. The Assistant Secretary was required to complete the investigation within 100 days of November 5, 1990, unless this Respondent was notified by certified mail of the reason why the investigation could not be completed within that time frame. This Respondent did not receive any notification as to why the investigation could not be completed within 100 days, nor any notification that the final investigative report was completed as required by 24 CFR 103.225 and 103.230.

The circumstances involving this deficiency are distinctly different from those of the Baumgardner case. In

Baumgardner, at least the Respondent received some notice, even though untimely, that the investigation would not be completed in 100 days. In the instant case, HUD continued merrily along with total indifference to the compulsory notice process with regard to this Respondent. Since HUD did not feel compelled to provide this Respondent with notice of the complaint in compliance with its regulations, one can only assume that HUD perceived notice of any delay in the investigatory process to be superfluous. Although the Baumgardner court stated that a little delay is not bad, there is a total absence of any notice in this case, in accordance with the regula-tions. One wonders if a delay of four hundred thirty-six days without notice is sufficient to trigger a Court's sense of indignation.[17] Certainly this tribunal does not disregard the requirements in the Code of Federal Regulations concerning notices to make elections, discovery cut-off dates and answer dates. The question that requires an answer in this instance: Why wink at or disregard investigation times? The haphazard selection of regulations that will be enforced and those that will not be enforced imperils this Respondent at the hands of a government agency that does not even comply with its own regulations. Evidently HUD has embarked on a system of "Do as I say, not as I do." Certainly to countenance this type of slipshod investigation and failure to comply with its regulations will only reinforce an attitude within HUD that the rules are made to apply to outsiders
but not to the agency.

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[17] Thefigure was calculated on the assumption that notice of the complaint was provided to this Respondent, which is not the case. February 13, 1991 through February 13, 1992 = 365 days February 14, 1992 through April 23, 1992 = 70 days 435 days

III. FAILURE TO MAKE REASONABLE CAUSE DETERMINATION WITHIN 100 DAYS OF FILING OF COMPLAINT

Section 103.400 of the Code of Federal Regulations is specific and mandatory that the General Counsel shall make a reasonable cause determination within 100 days of the filing of the complaint. In the event that the General Counsel is unable to do so, the Assistant Secretary must notify the aggrieved person and the Respondent by certified mail or personal service of the reasons for the delay. 24 CFR 103.400 (c) (2).

This record in this case demonstrates from the Charging Party's complaint or determination of reasonable cause that it has failed to meet or comply with its own regulations. The reasonable cause determination was issued over one year from the date that the investigation should have been completed and over fifteen months from the last amended complaint and twenty-two months from the filing of the initial complaint. There is nothing in the file to indicate that any reason for such a delay was communicated to this Respondent as required by the agency's own regulations. It is even more alarming when the investigator is fully aware of this Respondent's place of employment.

This heedlessness by HUD continues a pattern of absolute dis-regard of its own regulations. The recipient of the investigatory report, if in fact it was timely completed[18], sat on the investigatory report and did not issue any notice to this Respondent of the reason for the delay. This conduct should not be a shock to any reviewer of this case, based simply on the facts that there is no notice of the complaint, no

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[18]The incomplete investigatory report was undated and not signed, therefore making it difficult to determine when the investigatory report was completed.

notice that the investigatory report was complete and no notice of the cause for delay. The action of the person or tribunal who determined reasonable cause only perpetuated a track record of indifference to this Respondent's due process rights, the Code of Federal Regulations and the Fair Housing Act. Bureaucrats should not be allowed to operate in total derogation of the law with no oversight and total impunity.

IV. HUD IS BARRED FROM ISSUING CHARGE OR REASONABLE CAUSE DETERMINATION

Section 103.405 of Title 24 of the Code of Federal Regulations is very specific about the requirements concerning the issuance of a charge. Paragraph 3 of the foregoing section states:

> . . . HUD will not issue a charge with regard to the grounds unless the record of the investigation demonstrates that the respondent has been given notice and an opportunity to respond to the allegation.

Prior to any action by HUD, it must make a determination that the initial complaint was served in accordance with 24 CFR 103.50.

The record in this matter demonstrates that the Respondent was not served. It would appear that HUD's heedless indifference to its own regulations would necessitate dismissal on this ground alone.

The precipitous action of HUD to file a determination of reasonable cause perpetuates a callous disregard of the due process rights of this Respondent. Basic due process dictates that a tenant who is evicted from his apartment is entitled to notice and an opportunity to be heard prior to the termination of his tenancy rights. In the instant case, HUD has deprived this Respondent of his due process rights in absolute

derogation of the Respondent's rights entitled by the Code of Federal Regulations and the Fair Housing Act. HUD has failed to give the Respondent notice, and therefore, this charge must be dismissed. To hold otherwise would be to further wink at the strictness of the regulations. If this regulation is not enforced, nothing remains to ensure this Respondent's basic due process rights.

V. FAILURE TO SERVE THE REASONABLE CAUSE DETERMINATION IN COMPLIANCE WITH SECTION 103.405 OF THE CODE OF FEDERAL REGULATIONS

Section 103.405 of Title 24 of the Code of Federal Regulations requires the General Counsel within three business days to, among other requirements:

> (3) Serve the charge and notifications in accordance with 24 CFR 104.40 . . .

Section 104.40 specifies that service of documents may be made by personal service or by mailing a copy to the last known address. The key issue in this section is "last known address" and whether the Charging Party knew or even had the remotest idea of the address of this Respondent.

This Respondent has not received one complaint from the Charging Party in compliance with the regulations. No complaints have been served on him personally or by certified mail. Certainly, the threshold issue concerning the necessity of a party's participation, response to a complaint or requirements to appear should be predicated on notice to him in compliance with the law. It is incumbent upon this tribunal to definitely state that enough is enough. No notice of the complaint, no investigative report completed in 100 days of the filing of the complaint or last amended complaint, no notice of extension to complete the investi-gatory report, no

reasonable cause determination completed within 100 days of the complaint or last amended complaint, no notice of need for extension to determine reasonable cause, and to place the cherry on the top of this treat, HUD failed to serve the Respondent with the Determination of Reasonable Cause in compliance with its regulations. How in the world anyone could even entertain the reasonable cause determination in light of the foregoing atrocities at the expense of the Respondent's due process rights is incompre-hensible. Ask not for whom the bell tolls, it tolls for this Respondent's due process rights which have been trampled upon by a bureaucratic process out of control.

In conclusion, this case has been under consideration by HUD for over twenty-three months without service of the complaint upon this Respondent. Elephants have been conceived and born during this time period, yet HUD cannot deliver a notice to this Respondent that a complaint was filed. The actions of HUD should neither be condoned nor encouraged by permitting this process to proceed. If the Sixth Circuit was "seriously troubled" in Baumgardner by HUD deficiencies in carrying out statutory proceedings, it will be absolutely appalled by this travesty. This Respondent should be dismissed for all the foregoing reasons.

VI. PROTECTIVE ORDER ARGUMENT

This Respondent has filed a Motion to Dismiss that challenges the jurisdiction and procedures used to bring this case before this tribunal. There are serious and substantial questions concerning the denial of this Respondent's due process rights, and the necessity to respond to the substantive issues involved in this proceeding without first addressing the Respondent's Motion to Dismiss will cause the Respondent to incur unnecessary expense and place a tremendous burden on this Respondent.

Further, this Respondent has not been served with any

documents concerning this proceeding. This Respondent has retained an attorney to answer the charge and assert defenses because of the actions of HUD to totally and completely trample and violate rights secured by the Constitution of the United States of America. The Respondent has not waived any rights and has challenged the jurisdiction of this proceeding among other defenses that he has asserted to this action.

The Charging Party has inundated the Respondent with discovery requests (Interrogatories, Production of Documents and Requests for Admissions) that are unduly burdensome to a Respondent who has not been properly served by the Charging Party. The Interrogatories are duplicative for each named Respondent. The Respondent strenuously objects to each Interrogatory due to lack of service and to Interrogatory Nos. 11, 12, 13, 14, 15 and 16 as being totally irrelevant to this action, as the only property that is the subject of this action is 6300 Montgomery Road, Cincinnati, Ohio. The Charging Party has embarked upon a fishing expedition to discover other properties owned by this Respondent that are not the subject of this complaint. Interrogatory Nos. 7, 8 and 9 seek to discover the work product of counsel and further violates the attorney-client privilege. Interrogatory No. 28 is the ultimate abuse of the discovery process, as the information is totally irrelevant to the cause of action. Interrogatory No. 27 is understandable, provided there is service, but No. 28 is purely burdensome and has no evidentiary value.

The Charging Party's request for admissions is another broad-based request to all respondents. The requests are not relevant to all Respondents and to this Respondent in particular. Once again there is no service on this Respondent, but he is expected to expend time and money to respond.

The Charging Party's Request for Production of Documents is the most burdensome of all the discovery

requests. Request No. 4 seeks all documents for the property at 6300 Montgomery Road, Cincinnati, Ohio. Once again, the only apartment that is the subject of this no-service complaint is No. 10. The Charging Party desires this Respondent to duplicate voluminous records for apartments and tenants that are not the subject of this complaint for a three-year period. Requests Nos. 5 and 7 build upon the outlandish request in No. 4. The Charging Party seeks information of all rental units owned by this Respondent, none of which are the subject of this complaint. Request No. 8 asks the Respondent to produce oral statements. How can the Respondent produce an oral statement? Request No. 11 seeks information subject to the attorney-client privilege, which is not discoverable, and there-fore, Respondent objects.

This Respondent is incurring legal expenses to defend this action that are mounting daily. The duplication costs and fees necessary to reply to the discovery request will only exacerbate a situation that is absolutely and totally out of control. Service on this Respondent has never been perfected, yet HUD is penalizing him by requiring him to expend monies to respond to discovery requests. Due process requires the intervention of this tribunal to halt the abuse of this Respondent's due process rights. HUD is absolutely out of control, and the failure of this tribunal to intervene will cause this Respondent's damages to grow.

This Respondent incorporates by reference his Motion to Dismiss and Memorandum in support of this Motion for a Protective Order. The Memorandum in support of the Motion to Dismiss articulates grave procedural defects that substantially prejudice this Respondent's due process rights and have prejudiced him in making a defense to the merits of the Complaint.

/S/_____
ROBERT G. KELLY
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was sent by regular U.S. mail on the _____ day of _____, 1992, to the following individuals:

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Attorney Advisor
U.S. Department of Housing and
Urban Development
77 West Jackson Boulevard, Room 2604
Chicago, Illinois 60604-3507

Gordon H. Mansfield
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In addition, the original of this document was filed with the Chief Docket Clerk, Office of Administrative Law Judges, U.S. Department of Housing and Urban Development, 409 3rd Street, S. W., Suite 320, Washington, D. C. 20024 by certified mail and a copy by regular mail on the foregoing date.

/S/_____
ROBERT G. KELLY

Supreme Court, U.S.
FILED
JUL 28 1997
CLERK

(4) (2)

Nos. 96-1712 and 96-1915

In the Supreme Court of the United States

OCTOBER TERM, 1996

DIONNE STAPLES, PETITIONER

v.

MICHAEL P. KELLY, ET AL.

MICHAEL P. KELLY, ET AL., CONDITIONAL CROSS-PETITIONERS

v.

DIONNE STAPLES, ET AL.

ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE SECRETARY, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

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QUESTION PRESENTED

Whether a court may reduce the amount of actual damages awarded to the victim of housing discrimination in violation of the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, on the ground that delay in the federal administrative processing of the complaint compounded the damages.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1712

DIONNE STAPLES, PETITIONER

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ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE SECRETARY, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16[1]) is reported at 97 F.3d 118. An earlier decision of the court of appeals (Pet. App. B17-B33) remanding the case for further proceedings is reported at 3 F.3d

[1] Citations to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 96-1712.

951. The initial decision of the administrative law judge, United States Department of Housing and Urban Development (ALJ) (Pet. App. C34-C86), and the initial decision of the ALJ on remand (Pet. App. D87-D107) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1996. Petitions for rehearing were denied on January 24, 1997. Pet. App. E109-E110. The petition for a writ of certiorari in No. 96-1712 was filed on April 24, 1997, and placed on the docket on April 28, 1997. The conditional cross-petition for a writ of certiorari in No. 96-1915 was filed on May 28, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. a. In March 1990, petitioner, Dionne Staples,[2] a single mother of twin daughters, inquired about renting a two-bedroom apartment in a complex owned by respondents Michael P. Kelly and John T. Kelly, and their sister-in-law. Pet. App. B18-B19. Petitioner was told by someone from the realty office of respondent Michael P. Kelly that only one child was allowed per bedroom. *Id.* at B18. Respondents later rented the apartment to a couple with no children. *Id.* at B19. Petitioner ultimately rented an apartment in a different location that was less convenient to public trans-

[2] We use "petitioner" to refer to Dionne Staples who is petitioner in No. 96-1712 and respondent in No. 96-1915. We use "respondents" to refer to Michael P. Kelly and John T. Kelly who are respondents in No. 96-1712 and conditional cross-petitioners in No. 96-1915. The Secretary, United States Department of Housing and Urban Development, is a respondent in both matters and is referred to as "HUD."

portation, to her family, to a grocery store, to a drug store, and to a library and parks. *Id.* at B18-19. Consequently, petitioner's commute to work was longer, costlier, and more complicated, and she had to rely on borrowed cars for transportation on the weekends. *Id.* at C39.

b. After her conversation with an individual in respondent's realty office, petitioner contacted a fair-housing organization which investigated respondents' apartment complex by using testers posing as prospective tenants and confirmed that respondents had a policy of permitting only one child per bedroom. Pet. App. B19-B20. On May 17, 1990, petitioner filed a complaint with the United States Department of Housing and Urban Development (HUD), alleging that she had been denied an apartment by respondents because of her familial status, in violation of the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*[3] Pet. App.

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[3] The prohibition against familial status was added to the FHA through the Fair Housing Amendments Act of 1988 (1988 Amendments), Pub. L. No. 100-430, 102 Stat. 1619. As amended, the FHA makes it unlawful "[t]o refuse to * * * rent * * * or to refuse to negotiate for the * * * rental of, or otherwise make unavailable or deny, a dwelling to any person because of * * * familial status." 42 U.S.C. 3604(a). The FHA also prohibits "discriminat[ion] against any person in the terms, conditions, or privileges of * * * rental of a dwelling * * * because of familial status." 42 U.S.C. 3604(b). And the FHA makes it unlawful for any person engaged in the rental of a dwelling to make any "statement * * * with respect to the * * * rental of a dwelling that indicates any preference,

B20. Respondents answered the complaint on June 5, and a conciliation meeting with HUD officials was held on July 19, but was not successful. *Ibid.*

The HUD investigator completed his investigation on October 2, 1990. HUD issued a reasonable cause determination and charge of discrimination on March 2, 1992. Pet. App. B20. HUD's completion of its investigation and reasonable cause determination thereby exceeded the 100-day period following the filing of petitioner's complaint within which the Act requires HUD either to complete those tasks or to notify respondents of the reason for the delay.[4] *Id.* at C46.

2. HUD's charge alleged that respondents violated the FHA, 42 U.S.C. 3604, and various regulations promulgated thereunder. Pet. App. C35. Petitioner was granted permission to intervene and a HUD administrative law judge (ALJ) held a three-day hearing at the end of May 1992. *Id.* at B20. After a post-hearing briefing period, the ALJ issued an initial

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limitation or discrimination based on * * * familial status * * * or an intention to make any such preference, limitation, or discrimination." 42 U.S.C. 3604(c).

"Familial status" is defined as "one or more individuals (who have not attained the age of 18 years) being domiciled with * * * a parent or another person having legal custody of such individual or individuals." 42 U.S.C. 3602(k)(1).

[4] The Act requires that, within 100 days of the filing of a complaint, HUD complete an investigation of an alleged fair housing violation and make a determination whether there is reasonable cause to believe such a violation occurred, "unless it is impracticable to do so." 42 U.S.C. 3610(a)(1)(B)(iv) and (g)(1). If HUD is unable to meet that deadline, HUD is supposed to notify the complainant and respondent in writing of the reasons for not doing so. 42 U.S.C. 3610(a)(1)(C) and (g)(1).

decision and order on August 26, 1992, which became the final order of the Secretary of HUD 30 days thereafter, pursuant to 42 U.S.C. 3612(h). Pet. App. C34-C86.

The ALJ found that respondent Michael P. Kelly, or agents under his direction and control, intentionally discriminated against petitioner because of her familial status, in violation of 42 U.S.C. 3604(a), and that their conduct violated 42 U.S.C. 3604(b) and (c). Pet. App. C54-C55. The ALJ concluded that respondent John T. Kelly was liable by virtue of his joint-ownership of the complex. *Id.* at C55-C56.

The ALJ rejected respondents' contention that the charge should be dismissed based on HUD's procedural missteps, including the fact that nearly two years elapsed between the date petitioner's complaint was filed and the date that HUD issued its charge of discrimination. The ALJ acknowledged that HUD had committed several procedural errors, including not notifying respondents that HUD would not be able to complete its investigation and determination of cause within the 100 days provided by statute. Pet. App. C60; but see *id.* at H145-H146. The ALJ found, however, that respondents were not substantially prejudiced in the preparation of their defense as a result. *Id.* at C60-C61.

The ALJ concluded that respondents were prejudiced with regard to damages because of HUD's delay in filing the charge of discrimination. Pet. App. C67-C68. The ALJ found that that fact did not constitute a legal basis for reducing the amount of damages owed petitioner, however, because "a search of the Act, its legislative history, and the cases * * * reveal[s] no authority for reducing the actual damages of a housing discrimination victim below the

proven amount because HUD has, without explanation, delayed presenting the case for adjudication." *Id.* at C68-C69. Therefore, the ALJ took HUD's delay into account instead when it considered HUD's request for civil penalties in the amount of $10,000. *Id.* at C75-C78. The ALJ explained that, under ordinary circumstances, he would have imposed a civil penalty less than $3,000, but he refused to impose any civil penalty in the instant case because the administrative delay increased the accrual period for the petitioner's damages and increased the amount of economic damages that respondents were ordered to pay. *Id.* at C76-C78.

The ALJ entered an injunction, ordering respondents to refrain from discriminating, to institute internal recordkeeping procedures, and to report to HUD for a specified period of time. Pet. App. C78-C83. The ALJ awarded Ms. Staples $10,430.76 in actual damages, $6,930.76 of which was for economic damages (compensating for the difference between the cost of respondents' apartment and the alternative housing petitioner obtained, the cost of finding that alternative, petitioner's increased transportation costs to work, increased commuting time, and time spent prosecuting her claim), and $3,500 was for intangible damages (emotional injury and loss of housing opportunity). *Id.* at C61-C66, C74. The ALJ refused to award damages for future losses because they were too speculative to be determined with reasonable specificity. *Id.* at C66-C67.

3. The court of appeals affirmed in part, vacated in part, and remanded for further proceedings. Pet. App. B17-B33. The court affirmed the ALJ's finding of unlawful discrimination and the injunction. *Id.* at B18. The court agreed, however, with respondents'

claim that they were denied the right to an objectively reasonable conciliation because the HUD investigator had participated in the conciliation process despite a HUD regulation that provides that, generally, agents should not take part in both the investigation and conciliation of the same case. 24 C.F.R. 103.300(c). Pet. App. B25-B32. The court therefore remanded the case to HUD so that the parties would "be given an opportunity to resolve this matter by means of a fair and reasonable conciliation effort." *Id.* at B32.

The court further ruled that, if conciliation failed, the matter was to be returned to the ALJ for further proceedings in light of the court's opinion. In addition, without elaboration, the court specified that "in no case should damages be assessed for the period during which HUD completely neglected this case." Pet. App. B32-B33. The court denied HUD's petition for rehearing. *Id.* at B17.

4. On remand, conciliation again failed and the matter was returned to the ALJ who, after further briefing, issued an initial decision which became the final order of the Secretary of HUD 30 days thereafter, pursuant to 42 U.S.C. 3612(h). Pet. App. D87-D108. The ALJ reconsidered the damages award in light of the court of appeals' decision. The ALJ rejected arguments by petitioner and HUD that he lacked authority to reduce the damages, noting that he was constrained to follow the court of appeals' decision. *Id.* at D90. Because the court of appeals did not identify a period "during which HUD completely neglected" the case, however, the ALJ ordered the parties to identify such a period or periods. *Id.* at D98. Respondents failed to identify any such period, arguing instead that HUD had completely neglected

the case from the day the complaint was filed. *Id.* at D99. The ALJ rejected that argument in light of HUD's investigation, attempt to conciliate, and reasonable cause determination, and ultimately concluded that, on the original record, he could not identify any specific period of complete neglect. *Ibid.* He declined to consider evidence submitted by HUD in support of its argument that it had, at no time, "completely neglected" the case. *Id.* at D99-D100. In order to comply with the court of appeals' order, the ALJ reduced the damages by the nominal amount of $1. See *id.* at D89, D91, D98-D101.

5. The court of appeals reversed the damages award. Pet. App. A1-A10. The court followed "the mandate of [the initial panel opinion] that a respondent in a housing discrimination case cannot be made to pay for the government's neglect," and concluded that the award for economic damages should have been based on an accrual period of one year (instead of 25 months) from the date of the incident. *Id.* at A5. The court explained that the "reasonable accrual period for damages in this case is twelve months: the period within which Congress intended HUD to carry out its administrative responsibilities and the standard term of a rental lease." *Ibid.* The court determined that petitioner's economic damages should be reduced to $3,571.03 based on its one-year limit. *Ibid.* In addition, the court reduced the amount of damages for emotional distress and loss of housing opportunity from $3,500 to $1,000 to account for the "period during which HUD mishandled the case," on

the basis that it "cannot ask the Kellys to pay for emotional distress caused by HUD." *Id.* at A6.[5]

In a dissenting opinion, Judge Ryan expressed his "strong disagreement" with the majority's reduction of the damages award to petitioner. Pet. App. A10-A16. He found "absolutely nothing in the record to support 'twelve months' as the appropriate period for the damage award," and noted that the majority did "not claim there is any record support for what it has done." *Id.* at A10-A11. He also noted that the parties, the ALJ, and the majority had not identified any period during which HUD completely neglected the case. *Id.* at A11. He concluded, therefore, that "[i]t is unjust in the extreme to penalize the victim, Staples, and reward the discriminators, the Kellys, because the majority is impatient with HUD." *Id.* at A11.[6]

DISCUSSION

We agree with petitioner that the court of appeals erred. The Secretary, United States Department of Housing and Urban Development (HUD), joined petitioner in seeking rehearing and in suggesting rehearing *en banc* in the court of appeals. HUD did not file a petition for a writ of certiorari, however, because the decision below appears to be the only

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[5] The court of appeals also affirmed the award of attorneys' fees to petitioner and reversed the denial of fees to respondents, ordering HUD to pay respondents $20,000 for fees and expenses. Pet. App. A6-A8, A10. Judge Ryan dissented from the order that HUD pay attorneys' fees to respondents. *Id.* at A11-A16.

[6] The court of appeals denied petitioner's and HUD's suggestions of rehearing en banc and the panel denied their petitions for rehearing, with Judge Ryan indicating that he would grant rehearing for the reasons stated in his dissent. Pet. App. E109-E110.

court of appeals decision to hold that HUD's delay can be used to deny full compensation to a victim of housing discrimination and, therefore, is an aberration that other courts of appeals are not likely to follow. Widespread application of the court of appeals' reasoning would, however, undermine substantially the remedial purposes of the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*, to make victims of housing discrimination whole. Thus, if the Court were to grant review, HUD would support petitioner. Also, if other lower courts were to adopt the approach of the court below, we believe that review by the Court could be warranted at such time.

Respondents' conditional cross-petition does not, in any event, warrant review. The court of appeals correctly refused to order dismissal of the charges based on respondents' contention (Cross-Pet. 12-20) that procedural missteps by HUD eliminated HUD's jurisdiction.

1. The court of appeals erred in reducing the amount of damages awarded to petitioner based on delay by HUD. Its ruling is inconsistent with the Court's holding in *Curtis* v. *Loether*, 415 U.S. 189 (1974), that, with regard to awards of actual damages under the FHA, "[t]here is no * * * discretion [t]here: if a [FHA] plaintiff proves unlawful discrimination and actual damages, [s]he is entitled to judgment for that amount." *Id.* at 197. The Court emphasized that "[a] damages action under the statute sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach." *Id.* at 195; see also *id.* at 196-197 (contrasting legal right to damages under FHA with discretionary award of backpay under Title

VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*).

Nothing in the FHA permits the damages awarded to a victim of housing discrimination to be limited to one year from the date a complaint is filed or to any other amount that is less than the actual damages suffered. The FHA requires an ALJ who has found that a respondent has engaged in a discriminatory housing practice, to order appropriate relief, including actual damages suffered by the aggrieved person. 42 U.S.C. 3612(g)(3). The ALJ in the instant case adhered to that requirement. The court of appeals upheld the ALJ's finding of unlawful discrimination and did not set aside any of the ALJ's findings regarding the injuries actually incurred by petitioner upon which the ALJ's damages amount was based. The court of appeals, therefore, erred in reducing the ALJ's damages award.

2. The court of appeals' ruling is in tension with the decision of the Court in *NLRB* v. *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969). In that case, the Court made clear that a federal agency's delay in processing an injured person's claim does not justify reducing the compensatory award to that person. The Court held that a court of appeals may not, on account of delay (approximately four years) by the National Labor Relations Board (Board), reduce a backpay award that an employer has been ordered by the Board to pay to certain employees because of the employer's unfair labor practice. *Id.* at 259. The Court did not disturb the lower court's finding that the Board "had been guilty of 'inordinate' delay," in violation of the requirement that it "proceed with reasonable dispatch to conclude any matter presented to it." *Id.* at 262, 264 (citing former Section 6(a) of the Admin-

istrative Procedure Act, 5 U.S.C. 1005(a) (1964)). The Court assumed that the Board's delay violated that statutory mandate, but nonetheless concluded that the Board was "not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *Id.* at 265. In *NLRB* v. *International Ass'n of Bridge Ironworkers, Local 480*, 466 U.S. 720 (1984) (per curiam), the Court reaffirmed the now well-established principle of *Rutter-Rex Mfg. Co.* that the Board cannot "punish[] employees for the Board's nonfeasance." 466 U.S. at 725.

The same principle applies in the instant case. As in *Rutter-Rex Mfg. Co.*, the court of appeals found that the federal agency's delay violated a statutory mandate to act expeditiously. On that basis, the court of appeals decreased the amount of the award the agency had ordered the wrongdoer to pay to the victim of the unlawful conduct that prompted the agency review. But, the modification of the administrative award left the victim "worse off than [she] would have been but for" the unlawful conduct of the wrongdoer. See *Rutter-Rex Mfg. Co.*, 396 U.S. at 263. And, the modification undermined the purposes of the administrative award—"vindicat[ing] the public policy of the statute by making the [complainant] whole for losses suffered on account of" the conduct that violated the statute. See *ibid.* Therefore, proper resolution of the instant case would lead to a similar result here—reversal of the court of appeals' judgment and a ruling that petitioner is entitled to her full damages award. Cf. *Kraszewski* v. *State Farm Gen. Ins. Co.*, 912 F.2d 1182, 1186 (9th Cir. 1990) (applying *Rutter-Rex Mfg. Co.* principle in case under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

2000e *et seq.*, to preclude reduction of backpay awards because of court delay, noting that the remedial provisions of the NLRA and Title VII are analogous and have similar purposes), cert. denied, 499 U.S. 947 (1991); *United States* v. *Lee Way Motor Freight, Inc.*, 625 F.2d 918, 932-933 (10th Cir. 1979); see also Pet. 14.

3. The court of appeals' decision is inconsistent with the overall enforcement scheme of the FHA. Before 1988, victims of housing discrimination in violation of the FHA had to file private civil actions in order to vindicate their statutory rights. A gap in enforcement resulted because such private litigation proved to be too costly or time-consuming for many housing discrimination victims. In 1988, when Congress enacted the Fair Housing Amendments Act of 1988 (1988 Amendments), Pub. L. No. 100-430, 102 Stat. 1619, one of its central purposes was to create more effective remedies for violations of the Act by giving HUD a more active role in enforcement of the Act, including the authority to award actual damages to victims of discrimination, and by creating an administrative process through which victims could vindicate their statutory rights, instead of pursuing private litigation. See H.R. Rep. No. 711, 100th Cong., 2d Sess. 5-7, 13, 16-17 (1988); see also *HUD* v. *Blackwell*, 908 F.2d 864, 868-869 (11th Cir. 1990) (discussing 1988 enactment of administrative enforcement mechanism).

The court of appeals' decision, however, creates a disincentive to discrimination victims to rely on that administrative process and on HUD's authority to award damages. As petitioner points out (Pet. 20), if she had chosen to vindicate her rights through a private lawsuit instead of the administrative process, she would have had two years within which to bring

her civil action. 42 U.S.C. 3613(a)(1)(A) (two-years' statute of limitations). That limitations period would have been tolled during any period in which HUD had been investigating her complaint. 42 U.S.C. 3613(a)(1)(B). And, petitioner could have chosen to pursue a private lawsuit in lieu of an administrative adjudication up to the beginning of the hearing on the merits before the ALJ. 42 U.S.C. 3613(a)(3). Had petitioner filed a civil action, she would have been entitled, under *Curtis* v. *Loether*, *supra*, to a full award of actual damages. Instead, however, as a result of petitioner's having pursued relief through administrative channels, the court of appeals set an arbitrary one-year accrual period on petitioner's actual damages—an approach which threatens to erode the intended benefit and cost-effectiveness of the administrative process under the FHA, by placing the risk of budgetary constraints or other factors that might cause delay in the administrative process on the victim of discrimination who invokes that process.

Moreover, the one-year limit on accrual of actual damages established by the court of appeals conflicts with the period of time within which actual damages may accrue under the FHA's timeframe for a final administrative determination of damages. It is clear from that statutory timeframe that Congress contemplated that actual damages could accrue for longer than 12 months. A victim of discrimination may file a complaint with HUD up to one year after a discriminatory housing practice has occurred or terminated. 42 U.S.C. 3610(a)(1)(A)(i). HUD has 100 days to investigate and bring a charge, 42 U.S.C. 3610(a)(1)(B)(iv) and (g)(1), and longer, so long as it notifies the complainant and respondent in writing of

the reasons why it was unable to complete the investigation or make the probable cause determination within 100 days. 42 U.S.C. 3610(a)(1)(C) and (g)(1). The ALJ has a 120-day period following issuance of the charge within which to commence a hearing on the merits or, again, a longer period is permitted so long as the ALJ notifies the parties of the reason for the delay. 42 U.S.C. 3612(g)(1). Thus, the FHA, on its face, anticipates that significantly more than 12 months may elapse from the time the discriminatory housing practice occurred or terminated until the date of an administrative hearing. And the FHA clearly authorizes a longer period of time where the agency notifies the parties of the reasons for any delay, as HUD maintained it did here. See Pet. App. H145-H146. The court of appeals' decision limiting the accrual period for actual damages to 12 months from the date of the incident cannot be reconciled with this statutory scheme.[7]

4. Cross-petitioners contend (Cross-Pet. 12-20) that HUD completely neglected this case from the date the complaint was filed and therefore was divested of jurisdiction over the matter.

The court of appeals' refusal to order the charges dismissed on account of HUD's procedural missteps, which did not prejudice respondents' defense, is in accord with well-established principles and does not

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[7] The court of appeals' decision also raises the specter of a two-tiered system of justice that works to the detriment of complainants who need to rely on the federal administrative process because they cannot afford to bring an action in court. Cf. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 438-442 (1982) (opinion of Blackmun, J., joined by Brennan, Marshall, O'Connor, JJ.); *id.* at 443-444 (opinion of Powell, J., concurring in judgment, joined by Rehnquist, J.)

merit further review. The failure of an administrative agency to comply with procedural requirements, including statutory time limits, does not automatically eradicate its jurisdiction to enforce the statute. In *Brock* v. *Pierce County*, 476 U.S. 253, 259-260 (1986), the Court held that failure of the Secretary of Labor to issue a final determination as to the misuse of federal funds by a grant recipient did not preclude the Secretary from recovering the misused funds. In doing so, it relied on the "great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *Id.* at 260 (quoting *United States* v. *Nashville, C. & St. L. Ry.*, 118 U.S. 120, 125 (1886)). The Court emphasized that statutory language mandating a federal agency to act within a certain time, does not, "standing alone, divest the Secretary of jurisdiction to act after that time." *Id.* at 266; see *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) ("if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanctions").[8]

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[8] *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980), does not suggest a different result. See Cross-Pet. 20. There the Court held that an action filed by a private plaintiff after the expiration of the 300-day time period specified in Section 706(e) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e), was time-barred. As this Court noted in *Pierce County*, 476 U.S. at 261, *Mohasco Corp.* involved the failure of an individual to comply with a statute of limitations that required only the filing of a complaint within a specified period. In contrast, the statutory time limitations in *Pierce County* and in this case require a

As in *Pierce County*, nothing in the present statute or its legislative history indicates that Congress intended to terminate HUD's jurisdiction if it failed to meet the statutory time schedule for administrative review. Indeed, the FHA indicates that Congress itself intended to monitor noncompliance with the statutory timeframe, and it does not suggest that noncompliance would elimi nate administrative jurisdiction. See 42 U.S.C. 3608(e)(2)(B)(i), (ii) and (iii) (requiring that HUD report to Congress, at least annually, identifying "the number of instances (and reasons therefor)" in which HUD did not complete investigations as required by Section 3610(a)(1)(B), did not make cause determinations within the time specified in Section 3610(g), and did not commence hearings or make findings and conclusions as required by Section 3612(g)).[9] Accordingly, the conditional cross-petition for a writ of certiorari should be denied.

5. Despite the court of appeals' errors, we did not file a petition for a writ of certiorari, as noted above, because the decision below appears to be an aberration that other courts are not likely to follow. Moreover, the decision below seems to be a departure from the court of appeals' own precedent, in which it has held that the purpose of the Fair Housing Act is to make

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federal agency to make a substantive legal determination about whether a particular set of facts, developed after investigation, establish a violation of the statute. As the *Pierce County* Court noted, "[t]his is a more substantial task than filing a complaint, and the Secretary's ability to complete it within 120 days is subject to factors beyond his control." *Ibid.*

[9] Cross-Petitioners also challenge (Cross-Pet. 20-21) the court of appeals' attorneys' fees determinations, but they do not suggest any reason justifying review by this Court.

whole the victims of discrimination, *United States* v. *City of Birmingham*, 727 F.2d 560, 566 (6th Cir.), cert. denied, 469 U.S. 821 (1984), and that a reviewing court should not deprive a victim of conduct in violation of federal law of her right to make-whole relief because of purported neglect by a federal administrative agency. *International Bhd. of Elec. Workers, Local 648* v. *NLRB*, 440 F.2d 1184, 1185 (6th Cir. 1971); *NLRB* v. *Seligman & Assoc., Inc.*, 808 F.2d 1155, 1161-1162 (6th Cir. 1986), cert. denied, 484 U.S. 1026 (1988). The absence of legal analysis and citation to applicable precedent[10] lends credence to the view of the dissenting judge below that the decision appears to have been triggered by concerns unique to this case (Pet. App. A10, A11) and therefore does not reflect a doctrinal shift in the law of the circuit.

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[10] Although the panel majority purported to anchor its decision in the Sixth Circuit's prior decision in *Baumgardner* v. *HUD*, 960 F.2d 572 (1992), the ruling below goes well beyond *Baumgardner*. Although the *Baumgardner* court stated that "HUD's delay and handling did have an adverse impact on the question of damages," *id.* at 580, it did not reduce any damages to the complainant on that basis. The *Baumgardner* court reduced the compensatory damages award because of lack of proof of economic loss to the complainant, *ibid.*, and, based on "the facts of th[at] case," the lack of necessity for an award of "presumed damages" for loss of civil rights, *id.* at 583. The perception of the court of appeals below that *Baumgardner* supported its decision to reduce petitioner's damages award may, in part, be attributable to the fact that the Court in *Baumgardner* erroneously referred to the civil penalty as a "civil penalty damage award." *Ibid.* See Pet. App. C77 n.26; *id.* at D96 (ALJ explaining confusion between damages and civil penalties underlying *Baumgardner*). The ALJ here eliminated the civil penalty, however, an action that more appropriately places the consequences of any delay on the entity that caused it.

Respectfully submitted.

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No. 96—1712

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DIONNE STAPLES,

Petitioner,

v.

MICHAEL P, KELLY, JOHN T. KELLY, and the SECRETARY, UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF STAPLES'S PETITION FOR WRIT OF CERTIORARI

The brief filed by the Solicitor General in this case demonstrates that the Sixth Circuit in this case "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision" as contemplated by Rule 10(a). The Solicitor General's brief agrees, and the Kellys' brief makes no attempt to rebut, that *certiorari* is appropriate under Rule 10(c), as the Sixth Circuit has decided a federal question in a way that conflicts squarely with applicable decisions of this Court. In this brief reply, we

show that *certiorari* is appropriate.

Ms. Staples further suggests that, given the obviousness of the error below, summary disposition on the merits pursuant to Rule 16.1 may be appropriate. Vacating of the opinion for which *certiorari* is sought and reinstatement of the Secretary'ss Orders establishing Ms. Staples's damages is both consistent with law and dispositive of the issues raised before this Court.

The brief filed on behalf of the Kellys is but a rehashing of facts adjudicated four years ago mingled with a diatribe against HUD, Ms. Staples, and their respective counsel. The only marginally-substantive argument the Kellys attempt is the suggestion that this appeal is somehow time-barred because the *Kelly I* panel established the "complete neglect" standard, any appeal to this Court should have lain at that time. Even had appeal to this Court been appropriate in the context of a remand for additional fact-finding, the suggestion that the failure to seek *certiorari* at that time waived Ms. Staples's right to do so now obviously is incorrect; under the "complete neglect" standard, as applied by the Administrative Law Judge, Ms. Staples fared well. It was only the decision of the Court of Appeals to abandon even that badly-flawed standard and impose an arbitrary 12-month period for damage accrual in a Fair Housing case which raised the issues regarding which *certiorari* is now sought.[1]

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[1] The conditional cross-petition for *certiorari* raises no matters of substance, and so is not addressed in these pages.

A. The Solicitor General's Brief.

The Solicitor General does not oppose *certiorari* in this case. Rather, "if the Court were to grant review, HUD would support petitioner [in No. 96-1712]." Br. Sol. Gen. at 10. The Government agrees that the Sixth Circuit, by depriving Ms. Staples of more than half the damages to which she was entitled in this case, ruled in a manner directly inconsistent with this Court's decision in *Curtis v. Loether*, 415 U.S. 189 (1974). *Id.* The Government further reasons, however, that the decisions of the Sixth Circuit in this case miss the mark so widely that it is "an aberration that other courts of appeals are not likely to follow." *Id.* The Government does, however, believe that "if other lower courts were to adopt the approach of the court below . . . review by the Court could be warranted at that time." *Id.*

Perhaps the Government's position demonstrates a solicitude for this Court's time which, from the perspective of the Government, doubtless makes good sense. Perhaps, also, other judges will give the decisions in this case wide berth; well they might. That thought may give the Secretary solace with respect to his overall mission; it is, however, cold comfort indeed for Ms. Staples. She has been deprived not only of more than half her lawful damage award, but of even the 3% interest which the ALJ found her entitled.

However, we respectfully submit that the Secretary's seeming confidence that the decision below is *so* wrong that it

lacks any precedential value is overly optimistic. There is now a trilogy of Sixth Circuit opinions—*Baumgardner v. HUD*, 960 F.2d 572 (6th Cir. 1992), and the two opinions in this case—penalizing either the United States or the victim of discrimination for perceived administrative delay.[2] It is not a question of whether, but when the Sixth Circuit or another Court, frustrated with government slowness, will penalize another discrimination victim (in the manner of the Sixth Circuit in this case) "because the majority is impatient with" the Government. App. A10.

Additionally, the Solicitor General's observation that the panel decision in this case *de facto* establishes a disparity of remedies between the two enforcement mechanisms crafted by Congress (Br. Sol. Gen. at 13-14) demonstrates that the panel decision in this case has real-world consequences for victims of housing discrimination in the Sixth Circuit. So long as the decision appealed from even potentially reflects the law of the Sixth Circuit, those advising discrimination victims on their rights cannot guide them toward the administrative scheme (where their rights are contingent upon the manner in which HUD investigates), and away from the filing of their own

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[2] We agree with the Secretary (Br. Sol. Gen. at 18 n.10) that the result below actually was inconsistent with *Baumgardner*. However, both panel decisions in this case—with rehearing *en banc* denied on the second—demonstrate that the Court of Appeals has determined that *Baumgardner* supports its view that the victim of discrimination is properly penalized for administrative delay.

original action (where the decision below has no precedential effect). Regardless whether any other court ultimately follows the decision below, that decision has day-to-day consequences which adversely effect the case load of the district courts in the Sixth Circuit and frustrate the enforcement scheme crafted by Congress.

Finally, but perhaps most significantly, we hope it has not reached the pass that this Court is unable to vindicate the obvious disregard of this Court's decisions by a subordinate tribunal— what Judge Ryan called "an unedifying exercise in unrestrained judicial power" (App. A16)—because other courts may disregard the plainly-incorrect result below. Considerations of economy coincide precisely with those of fundamental fairness to Ms. Staples, and both strongly support our assertion that this Court should either grant *certiorari* and establish a briefing schedule, or exercise its summary-adjudication authority to correct the serious wrong done the victim in this case.

This Court has long recognized that the Fair Housing Act carries forward national policies which "Congress considered to be of the highest priority," and that its terms should receive judicial interpretations which carry those policies forward. *Trafficate v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209-212 (1972). The Secretary, the dissenting Judge, and the Solicitor General all agree that those policies are badly trammeled by the decision below.

It would be dismal irony were this Court to defer ruling on

this issue in Ms. Staples's case only to reach it, as the Government suggests, the next time it comes up. Respect for controlling decisions of this Court, the nationally important purposes of the Fair Housing Act, and Ms. Staples's right to simple justice all merit the attention of this Court in *this* case—not the next one.

CONCLUSION

For the reasons set forth above, for the reasons set out in our opening brief, for the reasons set out in the Solicitor General's brief, and for the reasons set out in the brief of *amicus curiae*, the petition in No. 96-1712 should be granted.

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